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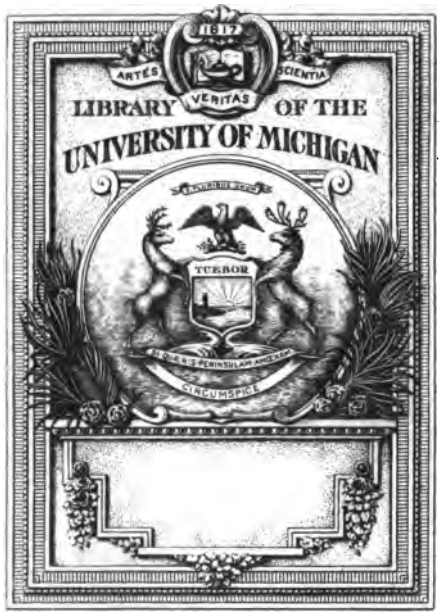
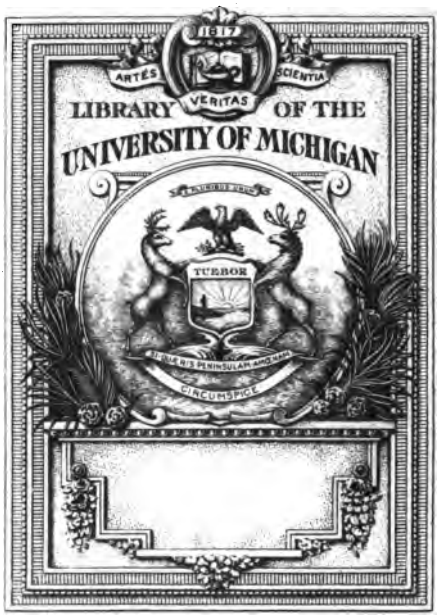



THE GIFT OF

Prof. Charles K. Adams




THE GIFT OF

Prof. Charles K. Adams

# THE WORKS

OF

## THE HONOURABLE

# JAMES WILSON, L. L. D.

LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND PROFESSOR OF LAW IN THE COLLEGE OF PHILADELPHIA.

PUBLISHED UNDER THE DIRECTION

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D. CALDWELL, Clerk of the District of Pennsylvania.

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# LECTURES ON LAW,

DELIVERED IN THE

*COLLEGE OF PHILADELPHIA,*

IN THE YEARS ONE THOUSAND SEVEN HUNDRED AND NINETY,
AND ONE THOUSAND SEVEN HUNDRED AND NINETY ONE.

# PART III.

## CHAPTER I.

### OF THE NATURE OF CRIMES; AND THE NECESSITY AND PROPORTION OF PUNISHMENTS.

HITHERTO, we have considered the rights of men, of citizens, of publick officers, and of publick bodies: we must now turn our eyes to objects less pleasing—the violations of those rights must be brought under our view. Man is sometimes unjust: sometimes he is even criminal: injuries and crimes must, therefore, find their place in every legal system, calculated for man. One consolatory reflection, however, will greatly support us in our progress through this uninviting part of our journey: we shall be richly compensated when we reach its conclusion. The end of criminal jurisprudence is the *prevention* of crimes.

What is an injury?—What is a crime?—What is reparation?—What is punishment?—These are questions, which ought to be considered in a separate, and also in a connected, point of view. At some times, they have been too much blended. In some instances, the injury and the reparation have been lost in the crime and the punishment. In other instances, the crime and the punishment have, with equal impropriety, been sunk in the reparation and injury. At other times, they have been kept too much apart. The crime has been considered as altogether unconnected with the injury, and the punishment as altogether unconnected with reparation. In other instances, the reparation only has been regarded, and no attention has been given to the punishment: the injury only has been calculated; but no computation has been made concerning the crime.

An injury is a loss arising to an individual, from the violation or infringement of his right.

A reparation is that, which compensates for the loss sustained by an injury.

A crime is an injury, so atrocious in its nature, or so dangerous in its example, that, besides the loss which it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the publick. Offences and misdemeanors denote inferiour crimes.

A punishment is the infliction of that evil, superadded to the reparation, which the crime, superadded to the injury, renders necessary, for the purposes of a wise and good administration of government.

Concerning an injury and a reparation, and the measures by which each of them ought to be estimated, it will not be necessary to say much; because, with regard to them, much confusion or mistake has not been introduced into the theory or practice of the law.

Concerning crimes and punishments, and concerning the relation between a crime and an injury, and between punishment and reparation, the case is widely different indeed. On those subjects, an endless confusion has prevailed, and mistakes innumerable have been committed. On those subjects, therefore, it will be proper to be full; and it will certainly be attempted—I promise not success in the attempt—to be both accurate and perspicuous.

From an inattention or a disregard to the great principle—that government was made for the sake of man, some writers have been led to consider crimes, in their origin and nature as well as in their degrees and effects, as different from injuries; and have, consequently, taught, that without any injury to an individual, a crime might be committed against the government. Suppose, says one of the learned commentators on Grotius, that one has done neither wrong nor injury to any individual, yet if he has committed something which the law has prohibited, it is a crime, which demands reparation; because the right of the superiour is violated, and because an injury is offered to the dignity of his character.[a] How naturally one mistake leads to another! A mistake in legislation produces one in criminal jurisprudence. A law which prohibits what is neither a wrong nor an injury to any one! What name does it deserve? We have seen[b] that a law

[a] 2. War. Bib. 15.

[b] Ante. vol. 2. p. 443.

which is merely harmless without being tyrannical, is itself a harm; and should be removed.

But this doctrine is unsupported by sound legal principle. Every crime includes an injury: every offence is also a private wrong: it affects the publick, but it affects the individual likewise. It is true indeed, that, in very gross injuries, we seldom hear of any satisfaction being awarded to the individual, for reasons, the propriety of which will, by and by, be examined. But in offences of an inferiour nature, the distinction, and, at the same time, the connexion between the crime and the injury is most accurately marked and preserved. For a battery, he who commits it may be indicted. Violence against the person of an individual is a disturbance of the publick peace. On this disturbance punishment may be inflicted. But in the crime and the punishment, the injury is not sunk, nor is the reparation lost. The party who has suffered the violence may bring his action against the party who has committed it: and recover in damages a satisfaction for the loss which has been sustained.

The doctrine, that a crime may be committed against the publick, without any injury being done to an individual, is as little consonant to the history, as it is to the principles of criminal jurisprudence. Among the Saxons, as we are informed by Mr. Selden, the most ancient way of proceeding, in criminal causes, was by an appeal of the party complaining. But afterwards, in cases which concerned damage, injury, or violence done to the body of a man or to his estate, the king—who represented the publick—was found to be therein prejudiced, beside the prejudice done immediatety to the subject: and upon this ground, a way was found out to punish the offender

by indictment, beside the satisfaction done to the party wronged. [c]

In the very early periods of society, those actions, even the most atrocious, which now are viewed and prosecuted as solely crimes against the state, were considered and resented merely as private injuries. In those ages, the conceptions of men were too crude to consider an injury done to an individual, as a crime committed against the publick; they viewed it only as a prejudice to the party, or the relations of the party, who were immediately affected. The privilege of resenting private injuries, in the opinion of a very ingenious writer on the history of the criminal law, [d] was that private right which was the latest of being surrendered to society. An improvement in government, so opposite to a strong propensity of human nature, could not have been instantaneous. The progressive steps leading to its completion were slow and almost imperceptible.

Coincident, in a very considerable degree, with these sentiments and observations, is a part of the law and practice of England, which at this moment subsists in its full force—I mean the law and practice concerning appeals, particularly appeals of death. An appeal is the party's private action, seeking satisfaction for the injury done him; and at the same time, prosecuting for the crown in respect of the offence against the publick. On an appeal, the benign prerogative of mercy cannot be exercised; because, saith the law, [e] the plaintiff has an interest in the judgment. This interest, however, may

[c] Bac. on Gov. 53.

[d] Kaims. Hist. L. Tr. 19, 20. [e] 5. Rep. 506.

be released; and the release will be a bar to the proceedings on an appeal.

These observations, drawn from so many separate sources, combine in the result, that a crime against the publick has its foundation in an injury against an individual. We shall see, in the progress of our investigation, that as, in the rude ages of society, the crime was too much overlooked; so, in times more refined, there has been a disposition, too strong, to overlook the injury.

Concerning the standard, by which crimes should be measured in municipal law, there has been much diversity of sentiment among writers, even the wisest and most enlightened. The law of nature, it is admitted on all hands, measures crimes by the intention, and not by the event. Should a standard, different from that which has been established by unerring wisdom, be adopted by uninformed man? Should not that rule, which is observed by the law divine, be observed, in humble imitation, by laws which are human? It is said, not; and it is said, that this difference must be accounted for by those peculiar attributes of the divine nature, which distinguish the dispensations of supreme wisdom from the proceedings of human tribunals. A being whose all-seeing eye observes the inmost recesses of the heart, and whose outstretched arm no flight or stratagem can elude or escape—such a being may consider and may punish every crime in exact proportion to the quantity of intrinsick guilt, which is contained in it. But with those to whom the trust and authority of human government is committed, the case is greatly different. Their power and their knowledge are limited by many imper-

fections: speed may remove, artifice may cover the object of punishment from their view or their grasp: by them, therefore, crimes must be considered in proportion to the ease and security with which they are committed or concealed, and not in strict proportion to their degrees of inherent criminality. Such, or nearly such, seem to be the sentiments of Mr. Paley.[f]

The Marquis of Beccaria goes farther: he thinks himself authorized to assert, that crimes are to be measured only by the injury done to society. They err, therefore, says he, who imagine that a crime is greater or less according to the intention of the person by whom it is committed; for this will depend on the actual impression of objects on the senses, and on the previous disposition of the mind; and both of these will vary in different persons, and even in the same person at different times, according to the succession of ideas, passions, and circumstances. Upon that system, it would be necessary to form, not only a particular code for every individual, but a new penal law for every crime. Men with the best intentions, do the greatest injury, and with the worst, the most essential services to society. That crimes are to be estimated by the injury done to society, adds he, is one of those palpable truths, which, though evident to the meanest capacity, yet, by a combination of circumstances, are known only to a few thinking men, in every nation and in every age.[g]

Sir William Blackstone, in one part of his Commentaries, seems to adopt these sentiments. All crimes,

[f] 2. Paley, 291. 292.

[g] Bac. c. 7. 8.

says he, are to be estimated according to the mischiefs which they produce in civil society.[h]

Mr. Eden, in one part of his book on the principles of penal law, tells us, agreeably to the same sentiments, that crimes are of temporal creation, and to be estimated in proportion to their pernicious effects on society:[i] in another part, he says, that, in some cases, it is necessary to punish the offence without any research into its motive; and that, in every case, it is impracticable for lawgivers to assume the divine attribute of animadverting upon the fact, only according to the internal malice of the intention:[j] in a third place, however, he expresses himself in the following manner: "It is true, that crimes are to be estimated, in some degree, by the actual mischief done to society; because the internal malignity of mankind is not within the cognizance of human tribunals. But if this position were received in its fullest latitude, it would prove too much; it would prove that every act of homicide is equally criminal; and that the intention is, in no case, to be considered:"[k] in a fourth place, he considers its flagitiousness as the standard, by which a crime should be measured; and informs us, that, by its flagitiousness, he means its abstract nature and turpitude, in proportion to which, the criminal should be considered as more or less dangerous to society:[l] in a fifth place, he intimates the same sentiment, that "the malignity of the fact is the true measure of the crime."[m]

Is it not shocking to reason, says Mr. Dagge, and destructive of virtue, to contend, that the ill consequence

[h] 4. Bl. Com. 41. [i] Eden. 89. [j] Id. 12.

[k] Eden. 12. [l] Id. 6. [m] Id. 10.

of an act is more to be considered than its immorality? To disregard a crime, however heinous, because it may be supposed not to have a bad effect on society; and to punish slight offences severely, because they tend more immediately to disturb the publick peace, is to sacrifice moral equity to political expediency. But, in fact, there is no real necessity for making such a sacrifice. If we would effectually provide for the lasting peace of society, we should first regard private offences, which are the sources of publick crimes. The subtle distinctions, which casuists make between moral and political delinquencies, are offensive to common sense.[n]

Concerning the standard by which punishments should be measured in municipal law, there has been, as might be expected, as much diversity of sentiment, as concerning the standard for the measure of crimes.

Publick utility, says Mr. Eden, is the measure of human punishments; and that utility is proportioned to the efficacy of the example.

Liberty, says Montesquieu,[p] is in its highest perfection, when criminal laws derive each punishment from the particular nature of the crime. Then the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing; and man uses no violence to man.

Among crimes of different natures, says Sir William Blackstone, those should be most severely punished, which are most destructive to the publick safety and

[n] 1. Dag. 335 343. [o] Eden. 151. [p] Sp. L. b. 12. c. 4.

happiness: and, among crimes of an equal malignity, those, which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others; and which, therefore, the offender has the greatest inducement to commit. [q]

Much to the same purpose are the expressions of Mr. Paley—the punishment should be in a proportion compounded of the mischief of the crime, and the ease with which it is executed. [r]

The end of human punishment, says Mr. Paley, in another place, should regulate the measure of its severity. [s] To the propriety of this rule every one will subscribe; but it throws us back upon another, concerning which there is an equal variety and opposition of sentiment.

Criminals, says Plato in his book concerning laws, are punished, not because they have offended, for what is done can never be undone, but that they may not offend. [t]

The very learned Mr. Selden objects to this doctrine, and says, that the antecedent crime is the essence of punishment. [u]

The amendment of the criminal is assigned by some as the end of punishment. To put it out of his power to do future mischief, is the end proposed by others.

[q] 4. Bl. Com. 16. [r] 2. Paley. 290. [s] Id. 287.

[t] 1. Dag. 203. Eden. 6. [u] 1. Dag. 203.

To deter from the imitation of his example, is that proposed by a third class of writers. Reparation to the injured, is an end recommended by a fourth class.

Almost all agree, that between crimes and punishments there ought to be a proportion: but how can this proportion be fixed among those, who are so much at variance with regard to the measure of the objects, between which it confessedly ought to subsist.

If there is so much diversity and contrariety of opinion respecting the principles, how much greater diversity and contrariety of conduct may we expect to find with regard to the execution, of the criminal law. Nay, how often shall we find those rules violated in its practice, the propriety of which is agreed in its theory.

The theory of criminal law has not, till lately, been a subject of much attention or investigation. The Marquis of Beccaria led the way. His performance derives much importance from the sentiments and principles, which it contains: it derives, perhaps, more from those, which its appearance has excited in others. It induced several of the most celebrated literati in Europe to think upon the subject. The science, however, is, as yet, but in a weak and infantine state. To convince you that it is so, I need only refer you to the unsatisfactory, nay, the contradictory sentiments, of which I have given you an account, with regard to the two great heads of crimes and punishments. That account has been extracted from the most celebrated writers on the subject

—from writers, indeed, who, on any subject, would deserve celebrity.

To give you a history of the practice of criminal law would be a task, not difficult, because the materials are very copious; but it would be very disgusting both to you and to me. I draw the character of this practice from one, who appears to have a head and a heart well qualified to feel and to judge upon the subject—I mean the Author of the principles of penal law. "The perusal of the first volume of the English State Trials,"[v] says he, "is a most disgustful drudgery." "The proceedings of our criminal courts at this era"—meaning that which preceded the revolution—"are so disgraceful, not only to the nation, but to human nature, that, as they cannot be disbelieved, I wish them to be buried in oblivion. From oblivion, it is neither my duty nor inclination to rescue them."—No; nor to rescue from oblivion the proceedings of other ages and of other countries, equally disgraceful and disgustful. I recite only a single instance.

Mr. Pope, in his picturesque and interesting retrospect of the barbarous reigns of the Conqueror and his son, asks, alluding to the laws of the forests—

> What wonder then, if beast or subject slain
> Were equal crimes in a despotick reign?
> Both, doom'd alike, for sportive tyrants bled,
> But while the subject starv'd, the beast was fed. [w]

Many, I dare say, have considered this as a fine fanciful description of the Poet. It has, however, been exceeded

[v] Eden. 199. [w] Windsor Forest.

by the strict severity of fact. We are, in the Life of Mr. Turgot, told in plain and sober prose, that so rigorous were the forest lawss of France even so lately, that a peasant, charged with having killed a wild boar, alleged as an alleviation of the charge, that he thought it was a man.[x]

In these lectures, I have had frequent occasion to observe and to regret the imperfection and the impropriety, which are seen too plainly in the civil codes and institutions of Europe: it is the remark—it is the just remark of Sir William Blackstone, that, "In every country of Europe, the criminal law is more rude and imperfect than the civil."[y] Instead of being, as it ought to be, an emanation from the law of nature and morality; it has too often been avowedly and systematically the reverse. It has been a combination of the strong against the weak, of the rich against the poor, of pride and interest against justice and humanity. Unfortunate, indeed, it is, that this has been the case; for we may truly say, that on the excellence of the criminal law, the liberty and the happiness of the people chiefly depend.

By this time, you see very clearly, that I was well warranted to announce, even in the summary of my system, that the criminal law greatly needs reformation. I added—In the United States, the seeds of reformation are sown. Those seeds, and the tender plants which from some of them are now beginning to spring, let it be our care to discover and to cultivate. From those weeds, luxuriant and strong, with which they are still intermingled, and by which, if they continue so, they

x Pri. Lect. 297. y 4. Bl. Com. 3.

will indubitably be choked, let it be our business industriously to separate them. From those beasts of the forest, by whom, if left unguarded, they will unquestionably be devoured, let it be our effort vigorously to defend them.

In the fields of the common law, which, for ages past, have lain waste and neglected, some of those seeds and plants will, on an accurate inquiry, be found. In the gardens of the American constitutions, others, and the most choice of them, have been sown and planted by liberal hands.

The generical term used immemorially by the common law, to denote a crime, is *felony*. True indeed it is, that the idea of felony is now very generally and very strongly connected with capital punishment; so generally and so strongly, that if an act of parliament denominates any new offence a felony, the legal inference drawn from it is, that the offender shall be punished for it capitally. But this inference, whatever legal authority it may now have acquired, is by no means entitled to the merit of critical accuracy. At this moment, every felony does not, in England, receive a punishment which is capital: petit larceny is a felony. At this moment, one felony escapes in England, as it must in all other countries, every degree of punishment that is human: suicide is a felony. At the common law, few felonies, indeed, were punished with death.

Treason is now considered, both in legal and in vernacular language, as a species of crime distinct from that of felony; but originally it was not so considered. "In

ancient time," says my Lord Coke,[z] "every treason was comprehended under the name of felony." Indeed it was so, down even to the time of Edward the third; for the famous statute of treasons, made in his reign, uses these expressions—"treason or *other* felony."

It will be very important to ascertain the true meaning of a term, employed so extensively and so long by the common law, to convey the idea of a crime.

In order to ascertain the true meaning, it is frequently of importance to ascertain the true etymology, of a term; and in order to ascertain that of the term *felony*, much learned labour has been bestowed by juridical lexicographers and criticks.

Sir William Blackstone asserts that its original is undoubtedly feudal; and being so, we ought to look for its derivation in the Teutonick or German language; and he prefers that given by Sir Henry Spelman; according to whom, *felon* is taken from two northern words, *fee*, which signifies, as all know, the fief, feud, or beneficiary estate; and *lon*, which signifies price or value. Felony is, therefore, the same as *pretium feudi*, the consideration, for which a man gives up his fief; as we say, in common speech, such an act is as much as your life or estate is worth. "In this sense," says Sir William, "it will clearly signify the feudal forfeiture, or act, by which an estate is forfeited or escheats to the lord."[a] He mentions two other derivations, and adds—"Sir Edward Coke, as his manner is, has given us a still stranger etymology;

[z] 3. Ins. 15. [a] 4. Bl. Com. 95. 96.

that it is, "crimen animo *felleo* perpetratum," with a bitter or gallish inclination.[b]

The authority of Sir Henry Spelman, in matters of legal antiquity, is unquestionably respectable: it is unfortunate, on this as on many other occasions, that his Glossary, the work here cited, is not in my power; and, therefore, I cannot examine particularly what he says upon the subject.

Serjeant Hawkins, so noted for his painful accuracy and his guarded caution, cites, in his treatise of the pleas of the crown, both the places which are cited by the Author of the Commentaries. The Serjeant had probably examined both: he follows the description of my Lord Coke. From this, I infer one of the two things—that Mr. Hawkins either found something in the Glossary, which prevented his assent to the conclusion drawn from it, or preferred the authority of my Lord Coke to that of Sir Henry Spelman. Thus, on one side we find Sir Henry Spelman and Sir William Blackstone; on the other, my Lord Coke and Serjeant Hawkins. In each scale of authority the weight is great; but, in both, it is equal: the beam of decision inclines at neither end.

If an estate could be purchased, instead of being forfeited, by a felony, I can easily conceive how the crime might be viewed as the consideration of the purchase: if a fee signified a crime, instead of signifying a fief, I can easily conceive how the estate might be viewed as the value forfeited by its commission. But the "pretium feudi," applied in the manner and arrangement in which

[b] 4. Bl. Com. 95. 1. Ins. 391 a.

the application is made here, appears, in my humble conception, to be etymology inverted. Thus stand the propriety and the authority of the derivation adopted by the Author of the Commentaries.

My Lord Coke, when he refers the meaning and the description of felony to the motive, and not to the event, to the disposition which produced it, and not to the forfeiture which it incurs, cites, in the margin, the authority of Glanville, the oldest book now extant in law, and two very ancient statutes; one made in the reign of Henry the third; the other in that of his son, Edward the first. With regard to Glanville, there must be some numerical mistake in the margin; for it refers us to the fifteenth chapter of the fourteenth book: in that book, there are only eight chapters. The statutes I have examined: you shall judge whether they support that meaning of felony, for the truth of which they are cited.

The first is the twenty fifth chapter of the statute of Marlbridge, which was made in the fifty second year of Henry the third. It is very short. "In future, it shall not, by our justices, be adjudged murder, where it is found misfortune only; but it shall take place as to such as are slain by felony—interfectis per feloniam—and not otherwise." Felony is here put most obviously in a contrasted opposition to misfortune; intention to accident. But what is peculiarly unfortunate for the etymology of Sir William Blackstone, a forfeiture was incurred at that time, and, according to the reprehensible theory retained in England for the sake of fees and not for the sake of justice, a forfeiture is still incurred, where a homicide happens by misfortune,[c] as well as where it is committed

[c] 4. Bl. Com. 188.

feloniously. If felony, therefore, "signifies clearly," as he says, "such a crime as works a forfeiture of the offender's lands or goods," the distinction mentioned in the statute would be absurd and ridiculous; referring felony to the principle, and not to the consequences of the fact, the provision in the statute is just and humane.

The other statute cited by my Lord Coke is the sixteenth chapter of Westminster the first, made in the third year of the first Edward. It distinguishes between those criminals who may be bailed, and those who ought not to be bailed. In the latter class are ranked those, who are taken for house burning *feloniously* done—"felonieusement fait."—Does this direct our view to the punishment, or to the intention?

But I am able to produce instances still more ancient and still more strong. The Mirrour of Justices, as has been mentioned oftener than once, contains a collection of the law, chiefly as it stood before the conquest; and consequently before the feudal system was introduced into England. In that collection there is a chapter concerning incendiaries: they are thus described—Incendiaries are those who burn a city, a town, a house, a man, a beast or other chattels *of their felony*—"de leur felony,"—in time of peace for hatred or vengeance. Do the words *of their felony* describe that principle, which gives the crime its "body and its form?" or do they relate to a feudal forfeiture, then unknown?

But to put the matter in a light still more striking and clear: in the next sentence, a case is supposed, in which the intention existed, the fact was committed; but the effect did not take place; and, consequently, the punish-

ment was not to be inflicted: yet the action is said to be done feloniously. "If one puts fire to a man *feloniously*—felonieusement—so that he is scorched or hurt, but not killed by the fire; it is not a capital crime."[d]

I suggest another argument, the legal force of which will, by every professional gentleman, be seen immediately to be irresistible. In every indictment for felony, the fact charged must be laid to have been done feloniously. To express this meaning, no other term in our language is legally adequate.[e] The antiquity of indictments, and the high authority of their essential forms, I pretend not to ascertain or to circumscribe.

But Sir William Blackstone, in this passage, is opposed not only by principle, by precedent, and by other authority; he is, I think, clearly opposed by his own. He says here, as we have seen, that felony clearly signifies the feudal forfeiture, or act, by which an estate is *forfeited, or escheats* to the lord. And yet, in another place,[f] he recommends great care in distinguishing between escheat to the lord, and forfeiture to the king; and traces them very properly to different sources. "Forfeiture of lands," says he, "and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of the punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any signiory or lordship paramount; but being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which

[d] 4. Com. Ang. Nor. 504.

[e] 1. Haw. 65.

[f] 2. Bl. Com. 251. 252.

escheat must undoubtedly be reckoned. Escheat, therefore, operates in subordination to the more ancient and superiour law of forfeiture.

" The doctrine of escheat upon attainder, taken singly, is this, that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit.* Upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest, and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superiour law of forfeiture intervenes, and intercepts it in its passage; in case of treason for ever; in case of other felony, for only a year and a day; after which time, it goes to the lord in a regular course of escheat, as it would have done to the heir of the felon, in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats, will most evidently appear from this incident to gavelkind lands (which seem to be the old Saxon tenure) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason."

Instead, therefore, of considering felony as a feudal forfeiture or escheat, we are here taught, and properly taught, to view them as flowing from different sources, and, in their operations, not only distinct, but incompatible.

Having thus traced the true meaning of felony, not to the event or part of the punishment, but to the principle and disposition from which it proceeds; our next step will be to ascertain, as plainly and as correctly as possible, the nature and character of that principle and disposition. It is characterized by the epithet *felleo*. Some derive it from the Latin verb *fallo*, which signifies, to deceive, others from the Greek word φαλος, which signifies an impostor or deceiver. In language, these derivations are different: in sentiment, they are the same. Perhaps they may lead us to as just a conception as can well be formed of felony—the generical term employed by the common law to denote a crime.

Without mutual confidence between its members, society, it is evident, could not exist. This mutual and pervading confidence may well be considered as the attractive principle of the associating contract. To place that confidence in all the others is the social right, to deserve that confidence from all the others is the social duty, of every member. To entertain a disposition, in which that confidence cannot with propriety be placed, is a breach of the social duty, and a violation of the social right: it is a crime inchoate. When an injury, atrocious in its nature, or evil in its example, is committed voluntarily against any one member, the author of that voluntary injury has, by his conduct, shown to all,

that their right is violated; that his duty is broken; that they cannot enjoy any longer their right of placing confidence in him; that he entertains a disposition unworthy of this confidence; that he is false, deceitful, and treacherous: the crime is now completed.

A disposition, regardless of social duty to all, and discovered by an injury, voluntary, and atrocious or dangerous, committed against one—this is a crime against society. Neither the disposition separated from the injury, nor the injury separated from the disposition, constitutes a crime. But though both the ingredients are necessary, they have not an equal operation in forming that character, from which a crime receives its denomination. In the consideration of crimes, the intention is chiefly to be regarded.

As the injuries, and the breaches of social trust and confidence, which we have mentioned, may relate to a great variety of objects, and, in their own nature, may be more or less aggravated, it follows, that crimes may be distinguished into many different species, and are susceptible of many different degrees.

Some think, that, at common law, the disposition, separated from the injury, constituted a crime. The saying, that "voluntas reputabitur pro facto," seems to have given rise to this opinion. On a close examination, however, it will, I imagine, appear, that, in all the cases, on which the opinion is founded, and from which the saying is drawn, an injury was done, though not the injury intended to be done.

A very ancient case is reported in the following manner. A man's wife went away with her adulterer; and they compassed the death of the husband; and as he was riding towards the sessions of oyer and terminer and gaol delivery, they assaulted and beat him with weapons, so that he fell down as dead: upon this they fled. The husband recovered, and made hue and cry, and came to the sessions, and showed all this matter to the justices; and, upon the warrant of the justices, the woman and her adulterer were taken, indicted, and arraigned. All this special matter was found by a verdict; and it was adjudged, that the man should be hanged, and the woman burnt.[g] Here, indeed, the injury intended and compassed—for to compass is, in legal understanding, to intend—was not carried into complete execution: an atrocious injury, however, was perpetrated.

Another case is mentioned to the following purpose. A young man was arraigned, because he intended to have stolen his master's goods, and came to his master's bed, where he lay asleep, and, with a knife, attempted, with all his force, to have cut his throat; and, thinking that he had indeed cut it, fled; upon this, the master cried out; and his neighbours apprehended the young man. All this matter was found by a special verdict; and, in the end, the young man was adjudged to be hanged. Quia voluntas reputabitur pro facto. But upon this case it is to be observed, that there was much more than mere intention: a barbarous outrage was committed on the person of a man; and was even thought by the aggressor to have been fully completed in its most extreme extent. For the young

[g] S. Ins. 5.

man, it is said, thought that he had indeed cut his master's throat. Accordingly, my Lord Coke says upon this subject, that it was not a bare compassing or plotting of the death of a man, either by word, or even by writing; but that some overt deed to manifest that compassing or plotting was necessary.

In a species of high treason, and in a species of felony, the rule is still observed—that the intention manifested by a degree of injury, though not the degree intended, constitutes the crime. This is the case in compassing the death of the king. Though this intention be not completed by his death; the crime is completed by what is called an *overt act*, manifesting that intention by injurious and disloyal conduct. Indeed this rule is so strictly observed in this species of treason, that even when the intention is carried into full effect by putting the king to death, this completion itself, connected with the intention, is not considered as constituting the crime: it is viewed only as the injurious and overt act which manifests that intention. Agreeably to these principles, the regicides of Charles the first were indicted as compassing his death, and the fact of beheading him was specified and made use of as one of the overt acts to prove this compassing.[h]

The species of felony, in which the rule above mentioned still governs, is burglary. A burglar, says my Lord Coke, is, by the common law, a felon, who, in the night, breaketh and entereth into a mansion house of another, with intent to commit some felony within it.[i] The intention in this crime is to commit a felony; but,

h Kel. 8. i 3. Ins. 63.

in order to constitute the crime, it is not necessary that the intention should be executed; the injurious acts done at the time and the place and in the manner described are sufficient: nay more; if the intention be completed by committing the felony, yet, if it be not committed at the time and the place, and in the manner described, it is not a burglary, though it is a felony of another species.

The foregoing cases, the view under which I have stated them, and the observations which I have drawn from them, show strongly the spirit of the common law in its estimation of crimes. In those cases, the felony or treason is traced to the malignity of the principle, not to the mischief of the consequences: the crime is constituted, though the event fail.

In other cases, indeed, the completion of the event is necessary to the constitution of the crime; but even in these, the intention is much more considered than the act. "Actus non facit reum, nisi mens sit rea,"[j] is, I believe, a rule of immemorial antiquity in the common law. If, indeed, it is an errour, as the Marquis of Beccaria alleges it to be, to think a crime greater or less according to the intention of him by whom it is committed, it is, in the common law, an errour of the most inveterate kind; it is an errour which the experience of ages has not been able to correct. "Justitia," said Bracton many hundred years ago, "est voluntarium bonum; nec enim potest dici bonum proprie, nisi intercedente voluntate: tolle enim voluntatem, et erit omnis actus indifferens. Affectio quidem tua nomen imponit operi

[j] 3. Ins. 6.

tuo. Crimen non contrahitur nisi voluntas nocendi[k] intercedat. Voluntas et propositum distinguunt maleficia. Furtum omnino non committitur sine affectu furandi. In maleficiis spectatur *voluntas* et non *exitus*."[l]

But, on one hand as well as on the other, there is an extreme. The intention governs; the intention communicates its colours to the act: but the act—the *injurious* act must be done. Abstract turpitude is not, I apprehend, a subject of cognizance in a human forum. The breach of our duty to man and to society alone is the object of municipal reprehension. For those sentiments, for those principles, nay for those actions, by which no other member of society can be affected, no one member is accountable to the others. For such sentiments, for such principles, and for such actions, he is amenable only to the tribunal within, and the tribunal above him. In the human code we have seen it to be a rule, that without an injury there is no crime.

Let us not, however, confine our conceptions of injury to the loss or to the risk merely of property. Of injury, all our rights, natural and civil, absolute and relative, are susceptible. Every injurious violation, therefore, of any of those rights may lay the foundation of a crime. The strings of society are sometimes stretched in the nicest unison: strike one, and all emit a complaining tone. Is a single member of society menaced? He who threatens is bound in a recognisance to keep the peace towards every other citizen, as well as towards him, to whom the immediate cause of alarm was given.[m]

[k] Brac. 26. [l] Id. 136 b. [m] 4. Bl. Com. 250.

I have now traced and described the principles of the common law with regard to the measure of crimes. We have seen with what wise and experienced caution its rules are guarded from every extreme. The result seems to be, that the common law estimates crimes by the design chiefly, but pays a proportionate attention to the fact —by the malignity, without overlooking the injury, of the transaction. After ideal perfection in her calculations concerning those amounts and proportions she aspires not; she is satisfied with that practical degree of accuracy, which a long and careful experience can attain.

From the consideration of crimes I pass to the consideration of punishments. On this subject some rules, and some valuable ones too, may be gleaned from the principles and the practice of the common law; but we must have recourse chiefly to those which are founded on our new but improved political establishments, and to those which result from the general principles of criminal jurisprudence.

Every crime, we have seen, includes an injury: this I consider as a leading maxim in the doctrine of crimes. In the punishment of every crime, reparation for the included injury ought to be involved: this I consider as a leading maxim in the doctrine of punishments.

In this particular, the law of England is defective to a degree both gross and cruel. The father of a family, whose subsistance depends on his personal industry, is, in the arms of his wife, and amidst his surrounding children, stabbed by the order of an insolent and barbarous neighbour. The miserable sufferers by the event are the miserable witnesses of the crime. The assassin,

who has ordered it, is opulent and powerful. To the honour of the English law and of its administration be it said, that no degree of opulence or power will purchase or command impunity to the guilty: this assassin will feel its avenging arm. But to the honour of the English law and of its administration can it be added, that every degree of injury shall find its proportioned degree of reparation; and that as the assassin is not above its power, so those who suffer by the assassination are not beneath its care? No. This addition cannot be made. The widow and the orphans, who were the witnesses of the crime and the sufferers by the loss, are recognized in the former, but not in the latter character. They attend to give their testimony on the trial. The rich culprit is condemned as he ought to be. They apply to obtain reparation for the loss—of the life? That is irreparable—of the industry of their husband and father, from the ample patrimony of the criminal, who occasioned the loss? To this application, reasonable and just, what is the answer which must be given in the spirit of the law? His property is forfeited by the crime; no funds remain to make you reparation for your loss. They are dismissed, without being reimbursed the expense of their attendance in consequence of their duty and the order of the law; for the king pays no costs. Can this be right?

It was, in ancient times, ordered otherwise and better. In the early part of our juridical history, we find that a part of the composition or forfeiture for homicide was given to the relations of the person deceased.[n] We find likewise, that, in those times, penalties in cases of per-

[n] 2. Henry 289. 2. Dag. 90. Eden. 217.

sonal injury had so far the nature of a civil redress, that they were given as a compensation to the person injured.[p] Thus it was among the ancient Saxons. Reparation, indeed, was one great object in the Anglo-Saxon system of criminal law. The principle may be traced to the Germans as described by Tacitus.[q] "Recipitque satisfactionem universa domus." In one of the very early laws of Pennsylvania, it is directed that "those next of kin shall be considered in the loss occasioned by the death of the party killed."[r]

Another quality of the Saxon jurisprudence in criminal matters deserves our attention—I add, our imitation: they inflicted very few capital punishments.[s] Such was the case, we are told, formerly in Scotland; such was it originally in Ireland; and such was it anciently in Wales.[t]

In every case before judgment, the Romans allowed an accused citizen to withdraw himself from the consequences of conviction into a voluntary exile. To this institution, the former practice of abjuration in England bore a strong resemblance. This was permitted, as my Lord Coke says, when the criminal chose rather "perdere patriam, quam vitam."[u] On the same principles, a liberty was given, in Greece, to a person accused to disappear after his first defence, and retire into voluntary banishment—in the language of the English law, to abjure the realm after the indictment was found.[v]

[p] 1. Reev. 12. [q] De. Mor. Germ. c. 21. 2. Dag. 77.

[r] R. O. Book A. p. 49. [s] 4. Bl. Com. 406.

[t] 1. Whitak. 278. [u] Eden. 31. [v] 2. Gog. Or. L. 72.

Sabacos, one of the legislators of Egypt, went still further. He abolished capital punishments, and ordained, that such criminals as were judged worthy of death should be employed in the publick works. Egypt, he thought, would derive more advantage from this kind of punishment; which, being imposed for life, appeared equally adapted to punish and to repress crimes. [w]

Punishments ought unquestionably to be moderate and mild. I know the opinion advanced by some writers, that the number of crimes is diminished by the severity of punishments: I know, that if we inspect the greatest part of the criminal codes, their unwieldy size and their ensanguined hue will force us to acknowledge, that the opinion has been general and prevalent. On accurate and unbiassed examination, however, it will appear to be an opinion unfounded and pernicious, inconsistent with the principles of our nature, and, by a necessary consequence, with those of wise and good government.

So far as any sentiment of generous sympathy is suffered, by a merciless code, to remain among the citizens, their abhorrence of crimes is, by the barbarous exhibitions of human agony, sunk in the commiseration of criminals. These barbarous exhibitions are productive of another bad effect—a latent and gradual, but a powerful, because a natural, aversion to the laws. Can laws, which are a natural and a just object of aversion, receive a cheerful obedience, or secure a regular and uniform execution? The expectation is forbidden by some of the strongest principles in the human frame. Such laws, while they excite the compassion of society for those who suffer,

[w] 3. Gog. Or. L. 15.

rouse its indignation against those who are active in the steps preparatory to their sufferings.

The result of those combined emotions, operating vigorously in concert, may be easily conjectured. The criminal will probably be dismissed without prosecution, by those whom he has injured. If prosecuted and tried, the jury will probably find, or think they find, some decent ground, on which they may be justified or, at least, excused in giving a verdict of acquittal. If convicted, the judges will, with avidity, receive and support every, the nicest, exception to the proceedings against him; and, if all other things should fail, will have recourse to the last expedient within their reach for exempting him from rigorous punishment—that of recommending him to the mercy of the pardoning power. In this manner the acerbity of punishment deadens the execution of the law.

The criminal, pardoned, repeats the crime, under the expectation that the impunity also will be repeated. The habits of vice and depravity are gradually formed within him. Those habits acquire, by exercise, continued accessions of strength and inveteracy. In the progress of his course, he is led to engage in some desperate attempt. From one desperate attempt he boldly proceeds to another; till, at last, he necessarily becomes the victim of that preposterous rigour, which repeated impunity had taught him to despise, because it had persuaded him that he might always escape.

When, on the other hand, punishments are moderate and mild, every one will, from a sense of interest and of duty, take his proper part in detecting, in exposing, in trying, and in passing sentence on crimes. The conse-

quence will be, that criminals will seldom elude the vigilance, or baffle the energy of publick justice.

True it is, that, on some emergencies, excesses of a temporary nature may receive a sudden check from rigorous penalties: but their continuance and their frequency introduce and diffuse a hardened insensibility among the citizens; and this insensibility, in its turn, gives occasion or pretence to the further extension and multiplication of those penalties. Thus one degree of severity opens and smooths the way for another, till, at length, under the specious appearance of necessary justice, a system of cruelty is established by law. Such a system is calculated to eradicate all the manly sentiments of the soul, and to substitute in their place dispositions of the most depraved and degrading kind.

The principles both of utility and of justice require, that the commission of a crime should be followed by a speedy infliction of the punishment.

The association of ideas has vast power over the sentiments, the passions, and the conduct of men. When a penalty marches close in the rear of the offence, against which it is denounced, an association, strong and striking, is produced between them, and they are viewed in the inseparable relation of cause and effect. When, on the contrary, the punishment is procrastinated to a remote period, this connexion is considered as weak and precarious, and the execution of the law is beheld and suffered as a detached instance of severity, warranted by no cogent reason, and springing from no laudable motive.

It is just, as well as useful, that the punishment should be inflicted soon after the commission of the crime. It

should never be forgotten, that imprisonment, though often necessary for the safe custody of the person accused, is, nevertheless, in itself a punishment—a punishment galling to some of the finest feelings of the heart —a punishment, too, which, as it precedes conviction, may be as undeserved as it is distressing.

But imprisonment is not the only penalty, which an accused person undergoes before his trial. He undergoes also the corroding torment of suspense—the keenest agony, perhaps, which falls to the lot of suffering humanity. This agony is by no means to be estimated by the real probability or danger of conviction: it bears a compound proportion to the delicacy of sentiment and the strength of imagination possessed by him, who is doomed to become its prey.

These observations show, that those accused of crimes should be speedily tried; and that those convicted of them should be speedily punished. But with regard to this, as with regard to almost every other subject, there is an extreme on one hand as well as on the other; and the extremes on each hand should be avoided with equal care. In some cases, at some times, and under some circumstances, a delay of the trial and of the punishment, instead of being hurtful or pernicious, may, in the highest degree, be salutary and beneficial, both to the publick and to him who is accused or convicted.

Prejudices may naturally arise, or may be artfully fomented, against the crime, or against the man who is charged with having committed it. A delay should be allowed, that those prejudices may subside, and that neither the judges nor jurors may, at the trial, act

under the fascinating impressions of sentiments conceived before the evidence is heard, instead of the calm influence of those which should be its impartial and deliberate result. A sufficient time should be given to prepare the prosecution on the part of the state, and the defence of it on the part of the prisoner. This time must vary according to different persons, different crimes, and different situations.

After conviction, the punishment assigned to an inferiour offence should be inflicted with much expedition. This will strengthen the useful association between them; one appearing as the immediate and unavoidable consequence of the other. When a sentence of death is pronounced, such an interval should be permitted to elapse before its execution, as will render the language of political expediency consonant to the language of religion.

Under these qualifications, the speedy punishment of crimes should form a part in every system of criminal jurisprudence. The constitution of Pennsylvania[x] declares, that in all criminal prosecutions, the accused has a "right to a speedy trial."

The certainty of punishments is a quality of the greatest importance. This quality is, in its operation, most merciful as well as most powerful. When a criminal determines on the commission of a crime, he is not so much influenced by the lenity of the punishment, as by the expectation, that, in some way or other, he may be fortunate enough to avoid it. This is particularly the case

[x] Art. 9. s. 9.

with him, when this expectation is cherished by the example or by the experience of impunity. It was the saying of Solon, that he had completed his system of laws by the combined energy of justice and strength. By this expression he meant to denote, that laws, of themselves, would be of very little service, unless they were enforced by a faithful and an effectual execution of them. The strict execution of every criminal law is the dictate of humanity as well as of wisdom.

By this rule, important as well as general, I mean not to exclude the pardoning power from my system of criminal jurisprudence. That power ought to continue till the system and the proceedings under it become absolutely perfect—in other words—it ought to continue while laws are made and administered by men. But I mean that the exercise of the pardoning power should be confined to exceptions, well ascertained, from the general rule. Confined in this manner, instead of shaking the truth or diminishing the force of the rule, the exercise of the power to pardon will confirm the former and increase the latter.

Need I mention it as a rule, that punishments ought to be inflicted upon those persons only, who have committed crimes—that the innocent ought not to be blended in cruel and ruinous confusion with the guilty?

Yes; it is necessary to mention this as a rule: for, however plain and straight it is, when viewed through the pure and clear ether of reason and humanity, it has not been seen by those whom pride and avarice have blinded; nay, it has been represented as a rule, crooked and distorted, by those who have beheld it through the

gross and refracting atmosphere of false policy and false philosophy. The doctrines of forfeiture and corruption of blood have found their ingenious advocates, as well as their powerful patrons.

There have been countries and times—there still are countries and times, when and where the rule, founded in justice and nature, that the property of the parent is the inheritance of his children, has been intercepted in its benign operation by the cruel interference of another rule, founded in tyranny and avarice—the crimes of the subject are the inheritance of the prince. At those times, and in those countries, an insult to society becomes a pecuniary favour to the crown; the appointed guardian of the publick security becomes interested in the violation of the law; and the hallowed ministers of justice become the rapacious agents of the treasury.

A poisoned fountain throws out its bitter waters in every direction. This rule, hostile to the nearest domestick connexions, was unfriendly also to the safety of the publick. If the inheritance was reaped by the prince; it was, by him, deemed a matter of small moment; that impunity was stipulated for the crime. Accordingly, we are told, that, in the thirteenth century, one of the methods, by which the kings of England and of other parts of Europe supplied their exchequers, was the sale of pardons for crimes.[y] When crimes were the sources of princely wealth, it is no wonder if they were objects of princely indulgence. In this manner we may naturally account for the disorder and violence, which, in those ages, prevailed so universally over Europe.

[y] Bar. on St. 27.

The law of forfeiture it has been attempted to defend by considerations drawn from utility, and also from natural justice. The high authority of Cicero is also[z] produced upon this occasion—"Nec vero me fugit, quam sit acerbum, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet."[a] Amicus Cicero—sed magis amica veritas. For the high authority of Cicero, I certainly entertain a proportionate degree of respect; but implicit deference should be paid to none. Besides; in the passage quoted, Cicero does not speak in a character of authority. He decides not as a judge: he pleads his own cause as a culprit; he defends, before Brutus, a rigorous vote, which he had given in the senate, against the sons of Lepidus.

But farther; upon a closer investigation, it will, perhaps, be found, that the principle of policy, on which Cicero rests his defence, as it certainly is not of the most generous, neither is it of the most enlarged kind; since forfeitures, far from preventing publick crimes and publick dangers, may have the strongest tendency to multiply and to perpetuate both. When the law says, that the children of him, who has been guilty of crimes, shall be bereaved of all their hopes and all their rights of inheritance; that they shall languish in perpetual indigence and distress; that their whole life shall be one dark scene of punishment, unintermitted and unabating; and that death alone shall provide for them an asylum from their misery—when such is the language, or such is the effect of the law; with what sentiments must it inspire those, who are doomed to become its unfortunate

[z] 4. Bl. Com. 375. [a] Ep. ad Brut. 12.

though unoffending victims?—with what sentiments must it inspire those, who from humanity feel, or by nature are bound to take, an interest in the fortunes and in the fate of those victims, unfortunate though unoffending? With sentiments of pain and disgust—with sentiments of irritation and disappointment—with sentiments of a deadly feud against the state which has adopted, and, perhaps, against the citizens also who have enforced it.

Vain is the attempt to range the cold and timid suggestions of policy against the vivid and the indelible feelings of nature, and against the warm though impartial dictates of humanity. Who will undertake to satisfy an innocent son, that he is the victim—who will undertake to persuade his relations—his virtuous—his patriotick—his meritoriously patriotick relations, that one so nearly connected with them is the victim, whom the publick good indispensably demands to be offered up as a sacrifice to atone for the guilt of his father? The sons of Lepidus were the children of the sister of Brutus. "Contra patrem Lepidum Brutus avunculus," says he very naturally in his answer to Cicero.

An attempt has been likewise made to support the law of forfeiture on the foundation of natural justice.[b] "All property," says Sir William Blackstone,[c] "is derived from society, being one of those civil[d] rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgress-

[b] 4. Bl. Com. 375. [c] 1. Bl. Com. 299. [d] 4. Bl. Com. 9.

ing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the movables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immovables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the only visible magistrate in whom the majesty of the publick resides."

It has often been said, that, at elections, the people of England sell their liberty for their own money; but this, I presume, is the first time that this kind of exchange has been brought forward as a fundamental article of their *original* contract.

A philosophizing is, on some occasions, an unfortunate turn. It was, we are told, an opinion long received in China, that the globe of the earth was supported on the back of an elephant. The people were satisfied and inquired no farther. An ingenious philosopher, however, was not satisfied so easily. If the earth, reasoned he, must be supported on the back of an elephant, *pari ratione*, the elephant must stand on the back of something else. Exactly fitted for his design, he found a broad backed tortoise. He placed the elephant upon it, and published his new theory of the manner in which the globe was supported. Unfortunately, the spirit of his *ars philosophandi* caught; and he was asked—on whose back will you place the tortoise? To

auctores; nec ulterius progrediatur metus quam reperiatur delictum."[i]

As the punishment ought to be confined to the criminal; so it ought to bear a proportion, it ought, if possible, to bear even an analogy, to the crime.[j] This is a principle, the truth of which requires little proof; but the application of which requires much illustration.

"It is not only," says the Marquis of Beccaria, "the common interest of mankind that crimes should not be committed; but it is their interest also that crimes of every kind should be less frequent, in proportion to the mischief which they produce in society. The means, therefore, which the legislature use to prevent crimes, should be more powerful in proportion as they are destructive of the publick safety and happiness. Therefore there ought to be a fixed proportion between punishments and crimes." "A scale of crimes," adds he, "may be formed, of which the first degree should consist of such as tend immediately to the dissolution of society; and the last, of the smallest possible injustice done to a private member of that society."[k]

To a scale of crimes, a corresponding scale of punishments should be added, each of which ought to be modified, as far as possible, according to the nature, the kind, and the degree of the crime, to which it is annexed. To select, where it can be done, a punishment analogous to the crime, is an excellent method to strengthen that association of ideas, which it is very important to establish between them.

[i] Eden. 49. [j] Id. 83. [k] Bec. c. 6. p. 17. 19.

In the graduation of each of these scales, and in the relative adjustment between them, a perfect accuracy is unquestionably unattainable. The different shades both of crimes and of punishments are so numerous, and run so much into one another, that it is impossible for human skill to mark them, in every instance, distinctly and correctly. How many intervening degrees of criminality are there between a larceny of the petty kind and a robbery committed with every degree of personal insult and outrage—between a private slander and a publick inflammatory libel—between a simple menace and a premeditated murder—between an unfounded murmur and a daring rebellion against the government?

But though every thing cannot, much may be done. If a complete detail cannot be accomplished; certain leading rules may be established: if every minute grade cannot be precisely ascertained; yet the principal divisions may be marked by wise and sagacious legislation. Crimes and punishments too may be distributed into their proper classes; and the general principles of proportion and analogy may be maintained without any gross or flagrant violation.

To maintain them is a matter of the first moment in criminal jurisprudence. Every citizen ought to know when he is guilty: every citizen ought to know, as far as possible, the degree of his guilt. This knowledge is as necessary to regulate the verdicts of jurors and the decisions of judges, as it is to regulate the conduct of citizens. This knowledge ought certainly to be in the possession of those who make laws to regulate all.

"Optima est lex," says my Lord Bacon, "quæ minimum relinquit arbitrio judicis."[1] If this is true with regard to law in general; it must be very true, and very important too, with regard to the law of crimes and punishments. What kind of legislation must that have been, by which "not only ignorant and rude unlearned people, but also learned and expert people, minding honesty, were often and many times trapped and snared!" Yet such is the character of the criminal legislation under Henry the eighth, given by the first parliament assembled in the reign of his daughter Mary;[m] which could well describe, for it still smarted under the legislative rod. The *candour*, at least, of legislation should be inviolable.

"Misera est servitus, ubi jus est incognitum." When a citizen first knows the law from the jury who convict, or from the judges who condemn him; it appears as if his life and his liberty were laid prostrate before a new and arbitrary power; and the sense of general safety, so necessary to the enjoy ment of general happiness, is weakened or destroyed. But a law uncertain is, so far, a law unknown. To punish by a law indefinite and unintelligible!—Is it better than to punish without any law?

A laudable, though, perhaps, an improvable degree of accuracy has been attained by the common law, in its descriptions of crimes and punishments. On this subject, I now enter into a particular detail. To the description of each crime, I shall subjoin that of its punishment; and

[1] 1. Ld. Bac. 249. [m] St. 1. Mary. c. 1.

shall mention, as I proceed, the alterations introduced by the constitution and laws of the United States and of Pennsylvania. The laws of other nations will frequently be considered in a comparative view.

## CHAPTER II.

### OF CRIMES AGAINST THE RIGHT OF INDIVIDUALS TO THEIR PROPERTY.

EVERY crime includes an injury: every injury includes a violation of a right. The investigations, which we have hitherto made concerning rights, will direct our course in that which we are now to make concerning wrongs.

I assumed, though, for the reasons assigned, I have not yet proved, that a man has a right to his property. I begin my enumeration of crimes with those which infringe this right.

I have observed that every injurious violation of our rights, natural and civil, absolute and relative, *may* lay the foundation of a crime.[a] I did not mean, however, to insinuate, by this observation, that every injury *ought* to be considered by the law in a criminal point of view.

[a] Ante. p. 28.

For every injury let reparation be made by the civil code, in proportion to the loss sustained; but let those injuries alone, which become formidable to society by their intrinsick atrocity, or by their dangerous example, be resented by society and prosecuted as crimes. Agreeably to this principle, a private injury done without actual violence, cannot be prosecuted by an indictment. [b] It is not considered as affecting the community.

This principle, however, seems to have gained its full establishment only by the liberality of modern times. It is remarkable, that a law made on this liberal principle, in an early period of Pennsylvania, was repealed by the king in council. [c] But this is not the only instance, in which the improving spirit of our legislation has been at first checked, but has received subsequent countenance by late decisions in England.

With the enjoyment and security of property, the security and the authenticity of its evidences is intimately connected. For this reason, dangerous and deliberate attacks upon that security or authenticity are crimes by the common law.

Forgery, at the common law, may be described "the fraudulent making or alteration of a writing, to the prejudice of another man's right." For this crime, the punishment of fine, imprisonment, and pillory may, by the common law, be inflicted on the criminal. [d]

[b] 3. Burr. 1703. 1733. [c] R. O. book A. vol. 1. p. 14.

[d] 4. Bl. Com. 245.

Among the Egyptians, publick notaries, who forged false deeds, or who suppressed or added any thing to the writings, which they had received to copy, were condemned to lose both their hands. They were punished in that part, which had been particularly instrumental in the crime.[e] In Lorrain, so long ago as the fourteenth century, forgery was punished with banishment.[f]

The first act of parliament, which appears against it, was made in the reign of Henry the fifth. This act punishes it by satisfaction to the party injured, and by a fine to the king.[g] But this first statute has been the fruitful mother of a thousand more. True it is, that the increase of commerce, the invention of negotiable and even current paper, the institution of national funds, and the many complex securities and evidences of real property have justly rendered the crime of forgery, beside its intrinsick baseness—for it is a species of the *crimen falsi*—a consideration of great importance and extent. But is it equally true, that all this is a sufficient reason, why, in almost all cases possible to be conceived, every forgery, which *tends* to defraud, either in the name of a real or of a fictitious person, should be made, as in England it is now made, a capital crime?[h] "Pluet super populum laqueos." There is a learned civilian, says my Lord Bacon, who expounds this curse of the prophet, of a multitude of penal laws; which are worse than showers of hail or tempest upon cattle; for they fall upon men.[i]

By a law of Pennsylvania, whoever shall forge, deface, corrupt, or embezzle deeds and other instruments of

[e] 1. Gog. Or. L. 59. [f] Bar. on St. 380. [g] Id. ib.
[h] 4. Bl. Com. 247. [i] 4. Ld. Bac. 3.

writing, shall forfeit double the value of the damage sustained, one half of which shall go to the party injured; and shall in the pillory, or otherwise, be disgraced as a false person.[j]

By a law of the United States it is enacted, that if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any certificate, indent, or other publick security of the United States; or shall utter, put off, or offer, or cause to be uttered, put off, or offered in payment or for sale, any such false, forged, altered, or counterfeited certificate, indent, or other publick security, with intent to defraud any person, knowing the same to be false, altered, forged, or counterfeited, and shall be thereof convicted; every such person shall suffer death.[k]

To forge, says my Lord Coke, is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will. The offence is called *crimen falsi*, and the offender *falsarius*; and the Latin word to forge is *falsare* or *fabricare*. And this is properly taken when the act is done in the name of another person.[l] "Falsely to make," says he, are larger words than "to forge;" for one may make a false writing within this act (he speaks of the 5th. Eliz. c. 14. in which, as to the present point, the words used are substantially the same with the words of the law now under consi-

j 1. Laws Penn. 5.

k Laws U. S. 1. cong. 2. sess. c. 9. s. 14.

l 3. Ins. 169.

deration) though it be not forged in the name of another, nor his seal nor hand counterfeited. As if a man make a true deed of feoffment under his hand and seal of the manor of Dale unto B.; and B. or some other rase out D and put in S, and then when the true deed was of the manor of Dale, now it is falsely altered and made the manor of Sale; this is a false writing within the purview of the statute.[m]

Another crime against the right of property is larceny. Larceny is described—the felonious and fraudulent taking and carrying away of the personal goods of another.[n] The Mirrour describes the crime as committed, "treacherousement."[o] More indictments are to be found for larceny, among the records of England, than for all the other crimes known to the law. It is computed that nineteen criminals out of twenty are prosecuted for this crime.[p]

According as the opinions and sentiments of men concerning property have been more or less correct, their notions concerning larceny have been more or less pure. Indeed, in the nature of things, this must be the case. Theft, or the secret acquisition of property, was, at Sparta, thought neither a crime nor a shame. Why? Because at Sparta, Lycurgus had established a community of goods; and when one got hold of a larger share than his neighbours, especially among the young people, it was considered merely as an instance of juvenile address, and as indicating a superiour degree of future dexterity. The senatorial order at Rome, we are told,

[m] 3. Ins. 169. [n] Id. 107. 4. Bl. Com. 230.

[o] C. 1. s. 10. 2. Reev. 42. [p] Bar. on St. 443.

enjoyed the distinguished privilege of being exempted from every prosecution for larceny.[q] What is still more remarkable, a similar claim of privilege was, in the time of Charles the second, insisted on by the house of lords in England, when a bill was sent to them from the commons' to punish—wood stealers![r] This anecdote we have on the authority of my Lord Clarendon, a peer, the chancellor, and the speaker of the house of lords.

Much has been said, in the English law books, concerning the distinction between grand and petit larceny. The distinction, however ancient, was never founded upon any rational principle; and the farther it flowed from its original source, the more unreasonable and cruel it became. Well might Sir Henry Spelman complain, that, while every thing else became daily dearer, the life of a man became more and more cheap.[s] But, what is more, this distinction, irrational and really oppressive, appears never to have been established with any degree of accuracy. The Author of Fleta says, if a person steals the value of twelve pence *and* more, he shall be punished capitally. Britton, in one place, says, if it is twelve pence *or* more. At this time, therefore—that is, in the reign of Edward the first—it was unsettled whether twelve pence was sufficient, or more than twelve pence was necessary, to superinduce the capital punishment.[t] A similar diversity and uncertainty of opinion appears in the reign of Edward the third.[u]

In the description of larceny, the taking is an essential part. For every felony includes a trespass; and if the

[q] Bar. on St. 491. [r] Id. ibid. [s] 4. Bl. Com. 238.

[t] 1. Reev. 485. [u] 2. Reev. 204.

person is guilty of no trespass in taking the goods, he can be guilty of no felony in carrying them away. [v] This is precisely the law language, conveying the doctrine, which I have illustrated generally and fully—that, without an injury, there can be no crime. A real trespass must be committed; but a real trespass will not be covered or excused by any artful stratagem to prevent the appearance of it. If one, who intends to steal the goods of another, obtains, with that intention, the process of the law to get them into his possession, in a manner apparently legal; this contrivance—an abuse of the law—will not excuse him from a charge of a felonious taking. [w]

To a larceny it is as necessary that the goods be carried away, as that they be taken. But the least removal of the goods is sufficient to satisfy this part of the description. To remove them from one place to another, even in the same room, is, in legal understanding, to carry them away. One, who intended to steal plate, took it out of a trunk, and laid it upon the floor, but was surprised before he could do more; he was adjudged guilty of larceny. [x]

The taking and carrying away, says Sir William Blackstone, and very truly, must also be *felonious*, that is, done *animo furandi*. This, by the way, is a clear and decided instance, that, in the meaning of the common law, felony is referred to the intention, and not to the event. As we saw in the former part of the description, that the crime could not exist without the injury; we see now, that the injury will not constitute the crime without the criminal intention. For, as the Author of the Commentaries next

[v] 1. Haw. 89. Kel. 24.

[w] 1. Haw. 90.

[x] Kel. 31. 1. Haw. 93.

observes, this requisite indemnifies mere trespassers, and other petty offenders. [y]

The last part of the description of larceny at the common law is, that the goods must be personal. Land, or any thing that is adhering to the soil or to the freehold, cannot in one transaction be made the subject of larceny. But if any thing of this kind is, at one time, separated from the freehold, so as to become a chattel; and is, at another time, taken and carried away; larceny is now committed. [z]

In different nations, and in the same nation at different times, larceny or theft has received very different punishments. It would be tedious minutely to recite them. On no subject has there been more fluctuation in the criminal laws both of Greece and Rome. Seldom, however, was larceny punished capitally at Athens; never among the Romans. In the early part of the Anglo-Saxon period in England, theft of the worst kind did not expose the thief to any corporal punishment. But the compensation which he was obliged by law to make, rendered larceny a very unprofitable business when it was detected. Ina, the king of Wessex, declared stealing to be a capital crime; but allowed the offender or his friends to redeem his life, by paying the price at which it was valued by the law. [a]

The distinction between punishing theft as a crime, and exacting compensation for it as an injury, is strongly marked in a law of Howel Dha, the celebrated legislator of Wales: "If a thief is condemned to death, he shall

[y] 4. Bl. Com. 232. [z] 1. Haw. 93. [a] 2. Henry 290.

not suffer in his goods; for it is unreasonable both to exact compensation, and to inflict punishment."

In the ninth year of Henry the first, larceny above the value of twelve pence was, in England, made a capital crime, and continues so to this day; and, in a vast number of instances, it is, by modern statutes, deprived of the benefit of clergy. These statutes, says Mr. Eden, are so complicated in their limitations, and so intricate in their distinctions, that it would be painful, on many accounts, to attempt the detail of them. It is a melancholy truth, but it may, without exaggeration, be asserted, that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear conception of the several sanguinary restrictions, to which, on this point, they are made liable. [b]

By a law of the United States, larceny is punished with a fine not exceeding the fourfold value of the property stolen, and with publick whipping not exceeding thirty nine stripes. [c] In Pennsylvania, a person convicted of larceny to the value of twenty shillings and upwards, shall restore the goods or pay their value to the owner, shall also forfeit to the commonwealth the value of the goods, shall undergo a servitude for any term not exceeding three years, and shall be confined and kept to hard labour: a person convicted of larceny under twenty shillings, shall restore the goods or pay their value to the owner, shall forfeit the same value to the commonwealth,

[b] Eden. 289. [c] Laws U. S. 1. cong. 2. sess. c. 9. s. 16.

shall undergo a servitude not exceeding one year, and shall be confined and kept to hard labour. [d]

Forgery and larceny seem to be the only crimes against the right of private property known to the common law.

Robbery is generally classed among the crimes against the right of private property; but somewhat improperly, in my opinion. Robbery receives its deep dye from outrage committed on the person; but as property also enters into the description of this crime, I shall consider it here.

Robbery, at the common law, is a violent and felonious taking from the person of another, of money or goods to any value, putting him in fear. [e] From this description it appears, that, to constitute a robbery, the three following ingredients are indispensable: 1. a felonious intention, or *animus furandi*. 2. Some degree of violence and putting in fear. 3. A taking from the person of another.

1. There must be a felonious intention to steal: larceny is a necessary, though by no means the most important ingredient, which enters into the composition of a robbery. The circumstances which are calculated and proper to evince this felonious intention, it is impossible to describe or recount: they must, in this as in other crimes, be left to the attentive consideration of those, by whom the person accused is tried. The value, however, of the property on which the larceny is committed,

[d] 2. Laws. Penn. 803. s. 3. 4. [e] 3. Ins. 68. 1. Haw. 95.

is, as to the robbery, totally immaterial. In this respect, a penny is equivalent to a pound.[f]

2. There must be some degree of violence and putting in fear. This indeed is the characteristick circumstance, which distinguishes robbery from other larcenies. If one assault another with such circumstances of terrour as put him in fear, and he, in consequence of this fear, deliver his money; this is a sufficient degree of violence; for he was put in fear by the assault; and gave his money to escape the danger.[g] To constitute a robbery, it is sufficient that the force used be such as might create an apprehension of danger, or oblige one to part with his property against his consent. Thus, if a man be knocked down without any previous warning, and stripped of his money while he lies senseless; this, though he cannot strictly be said to be *put in fear*, is undoubtedly a robbery.[h]

3. There must be a taking from the person of another. The thief must be in the possession of the thing stolen. If he go even so far as to cut the girdle, by which a purse hangs, so that it fall to the ground; yet if he do not take it up, he has not completed the robbery, because the purse was not in his possession.[i] The taking must be from the person; but this part of the description is answered, not only by taking the money out of one's pocket, or forcing from him the horse on which he actually rides, but by taking from him, openly and before his face, any thing which is under his immediate and personal care and protection. If one, wishing to save

[f] 3. Ins. 69.

[g] 1. Haw. 96, 97.

[h] Fost. 128. 4. Bl. Com. 242.

[i] 3. Ins. 69.

his money, throw it into a bush, and the thief take it up; this is a taking from the person.[j]

We are told by Mr. Selden, that, before the conquest, robbery was punished differently, by the different nations who came from the continent of Europe. By the Saxons, it was punished with death: by the Angles, and by the Danes, it was punished only with fine.[k] After the conquest, these different laws were settled by the Normans in the more merciful way; and if the delinquent fled, his pledge satisfied the law for him. But in the times of Henry the first, the law was again reduced to the punishment of this crime by death: and so it has continued ever since.[l]

In the ancient laws of Wales, it is expressly declared, that robbery shall never be punished with death; "because (say these laws) it is a sufficient satisfaction for this crime, if the goods taken be restored, and a fine paid to the person from whom they were taken, according to his station, for the violence offered him, and another to the king for the breach of the peace."[m]

Robbery, by a law of the United States, is punished capitally.[n] By a law of Pennsylvania, a person convicted of robbery forfeits to the commonwealth his lands and goods, and undergoes a servitude not exceeding ten years, in the gaol or house of correction.[o]

[j] 3. Ins. 69. 1. Haw. 96. [k] Bac. on Gov. 63. [l] Id. 88.

[m] 2. Henry 392. [n] Laws U. S. 1. con. 2. sess. c. 9. s. 8.

[o] 2. Laws Penn. 802. s. 2.

I proceed now to the consideration of two other crimes at the common law, which, though property, as in the case of robbery, enters into their description, yet receive their deep dye from outrages against personal security. This cannot be enjoyed without a legal guard around the *residence* of the person.

" A man's house is his castle" was the expression, in times rude and boisterous, when the idea of security was found only on its association with the idea of strength; and in such times, no expression more emphatical could have been used. In happier times, when the blessings of peace and law are expected and due—in such times, a man's house is entitled to an appellation more emphatick still—in such times, a man's house is his *sanctuary*. " Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?" [p] Into this sanctuary, the law herself, unless upon the most urgent emergencies, presumes not to look or enter. We have seen, on many occasions, with what a delicate—I may add, with what a respectful—reserve, she treats the near and dear domestick connexions. We may well suppose, that she will guard, with peculiar vigilance, the favoured spot in which a family reside. Even those who endeavour clandestinely to pry into its recesses—such are eaves-droppers—receive her reprehension: and unless the peace or security of the publick require it, she will not suffer its doors to be broken, to execute even her own imperial mandates. When she thus solicitously protects the residence of a family from inferiour insults, we may rely, that she will zealously defend

[p] Cic. pro dom. 41. [q] 4. Bl. Com. 169.

it from atrocious crimes. Such are arson and burglary.

Arson is a felony at common law, in maliciously and voluntarily burning the house of another.[r] This is not intended merely of the dwelling house itself, but extends to the outhouses; as the barn, the stable, the cow house, the dairy house, the mill house, the sheep house; which are parcel of the mansion house.[s]

This crime may be committed by wilfully burning one's own house, if the house of another is also burnt; but if no mischief is done to that of another, it is not felony, though the fire was kindled with an intention to burn the house of that other.[t] But if the intention is to burn the house of another person, and by the burning of this the house of a third person is also burned; the burning of the house of this third person is felony; because the pernicious event shall be coupled with the felonious intention.[u]

Neither the mere intention to burn a house, nor even an actual attempt to burn it, by putting fire to it, will, if no part of it be burnt, amount to felony; but if any part of the house be burnt, it is arson, though the fire afterwards go out of itself, or be extinguished.[v] No misfortune, nor even culpable negligence or imprudence, will amount to arson: it must be voluntary and malicious. A person, by shooting with a gun, set fire to the roof of a house; this was determined not to be felony.[w]

[r] 3. Ins. 66. 1. Haw. 105. [s] 3. Ins. 67. [t] Cro. Car. 376.

[u] 3. Ins. 67. 1. Haw. 106. [w] 1. Hale. P. C. 569.

Arson is a crime of deep malignity. The object of other felonies against the right to property, is merely to give it a new master; the object of arson is to destroy it—to lose it to society, as well as to its owner. The confusion and terrour which attend arson, and the continued apprehension which follows it, are mischiefs frequently more distressing than even the loss of the property.

The crime of arson was one of the very few punished capitally by the Saxon law. In the reign of Edward the first, those who perpetrated this crime were burnt, that they might suffer in the same manner, in which they had been criminal. [x] This crime is also one of the very few still punished capitally in Pennsylvania. [y z]

Burglary is a felony at the common law, in breaking and entering, by night, the mansion house of another, with intent to commit a felony. [a]

There have been some opinions, that this crime, on a construction of the phrase "by night," may be committed at any time after the setting and before the rising of the sun; because the day was deemed to begin at the end, and to end at the beginning of those times; but the later and better opinion is, that if there be day light enough to discern the countenance of a man when the crime is committed, it cannot amount to a burglary. [b]

x 1. Reev. 485.

y 1. Laws. Penn. 137. 476.

z By an act of assembly passed 22d April, 1794, arson is punished by imprisonment at hard labour, for a period not less than five, nor more than twelve years. 3. Laws. Penn. 600. *Ed.*

a 3. Ins. 63. 1. Haw. 101.

b 1. Haw. 101.

To a burglary it is necessary, that the house be both broken and entered. The breaking must be actual, and not merely such as the law implies in every unlawful entry on the possession of another. To open a window; to unlock the door; to break a hole in the wall; to enter an open door and unlatch a chamber door; to come down the chimney; to knock at the door and rush in when it is opened; to gain admittance by an abuse of legal process, or by the means of a conspiring servant; all these are actual breaches. The least degree of entry with any part of the body, or with an instrument held in the hand, or even a load discharged from a gun, is sufficient to satisfy that entry, which the law deems necessary to constitute the crime of burglary.[c]

In a dwelling house only burglary can be committed. But a house in which one sometimes resides, and has left with an intention to return; a house which one has hired, and into which he has brought part of his goods, though he has not lodged in it; a chamber in a college; a room occupied in a private house by a lodger; the out houses *adjoining* to the principal house; all these are mansion houses within the meaning of the law.[d] A shop may be parcel of a mansion house; but if it is severed by a lease to one who works in it by day only, and does not lodge in it, it is not burglary to break and enter it in the night time.

To a burglary, an intention to commit some felony, and not merely a trespass, is indispensable; but, as was shown on another occasion,[f] it is not necessary that the

[c] 1. Haw. 103. [d] 3. Ins. 64. 1. Haw. 103. 104. 4. Bl. Com. 226.

[e] Wood. Ins. 388. [f] Ante. p. 26.

felony intended be committed; and it is immaterial whether that felony be by common or by statute law.[g]

By the law of Athens, burglary was a capital crime.[h] Among the Saxons also, *burgessours* were to be punished with death.[i] In Pennsylvania, burglary and robbery receive precisely the same punishment.[j] The punishment for robbery has been already mentioned.

[g] 4. Bl. Com. 227.

[h] 1. Pot. Ant. c. 26.

[i] 1. Reev. 485.

[j] 2. Laws. Penn. 802. s. 2.

## CHAPTER III.

### OF CRIMES AGAINST THE RIGHT OF INDIVIDUALS TO LIBERTY, AND TO REPUTATION.

LIBERTY, as we have seen on former occasions, is one of the natural rights of man; and one of the most important of those natural rights. This right, as well as others, may be violated; and its violations, like those of other rights, ought to be punished, in order to be prevented. Yet these violations are scarcely discernible in our code of criminal law.

This we must ascribe to one of two causes. Either this right has been enjoyed inviolably: or the law has suffered the violations of it to escape with shameful impunity. The latter is the truth: I am compelled to add, that the latter, bad as it is, is not the *whole* truth. Violations of liberty have not only been overlooked: they have also been protected; they have also been encouraged; they have also been made; they have also been enjoined

by the law. I speak this not only concerning the statute law; I am compelled to speak it also concerning the common law of England: I speak this not only concerning the law as it was received in the American States before their revolution; I am compelled to speak it also concerning the law as it is received in them still: I speak this not only concerning the law as it is received generally in the other sister states; I am compelled to speak it also concerning the law as it is received in Pennsylvania: nay, I am farther compelled to speak it also of the law as it is recently received in our national government.

Our *publick* liberty we have indeed secured;—*esto perpetua*—But, notwithstanding all our boasted improvements—and they are improvements of which we may well boast—the most formidable enemy to *private* liberty is, at this moment, the law of the land.

In some former parts of my lectures,[a] I have had occasion to remark, and I have remarked with pleasure, that solicitous degree of attention which the law gives to personal security. Its most distant avenues are watchfully guarded. To decide questions, by which it may be affected in the highest, or even in inferiour degrees, I have shown, in a sublime part of our system, to be the incommunicable prerogative of sovereignty or selected sovereignty itself. I have shown, that, by an operation inexpressibly fine, personal safety never sees the arm which holds the sword of justice, but at the moment when it is found necessary that its stroke should be made. Inferiour to personal safety only, if indeed inferiour even to that, is the consideration of personal liberty.

[a] Ante. vol. 2. p. 384. et seq.

And yet, while personal safety can be authoritatively affected only by the community, or a body selected from the community impartially and for the occasion, the law implicitly, causelessly, unconditionally, and continually prostrates personal liberty at the feet of every wretch who is unprincipled enough to trample upon it. I say, unprincipled; because a citizen, who has principle, will not wound it by using the authority of the law. In every state of the union—in every county of every state, there are shops opened, nay licensed, nay established by the law, at which its authority may be purchased, for a trifle, by the worst citizen, in order to infringe the personal liberty of the best.

From the disgrace of these enormities against the rights of liberty, I gladly rescue the character and principles of the common law. The history of the several processes of capias, and orders and rules of commitment will show, when we come to it, that this part of our municipal law is of statute original; and that it was produced in the darkest and rudest, though its existence has continued in the most enlightened and the most refined times.

With another part of these enormities against the rights of liberty, however, impartiality obliges me to charge the common law. Man is composed of a soul and of a body. To mental as well as to bodily freedom, he has a natural and an unquestionable right. The former was grossly violated by the common law. Witness the many overgrown titles, by which the volumes of the law are still distended: witness, in particular, the customs *de modo decimandi*, and the writs *de excommunicato*

*capiendo* and *de hæretico comburendo.*[b] These parts I only mention; because from these parts we are happily relieved: they are parts of the common law, which did not suit those who emigrated to America: they were, therefore, left behind them.

But, in some respects, private liberty is still the orphan neglected; in others, she is still the victim devoted by our municipal law. So inveterate, indeed, is the vice of the law in this particular, that it has infected its very language. The terms, which denote the diminution or the destruction of personal safety—homicide, wounding, battery, assault—are all *prima facie* understood in an unfavourable meaning; though they are sometimes excused, or justified, or even enjoined, as well as sometimes prohibited and punished by the law: but to imprisonment, the idea of legal authority seems, in legal understanding, to be *prima facie* annexed: and when it speaks of the unauthorized kind, it is obliged to distinguish it by adding the epithets *false* or *unlawful.*

But legislators should bear in their minds, and should practically observe—and well persuaded I am, that our American legislators bear in their minds, and, whenever the necessary resettlement of things after a revolution can possibly admit of it, will practically observe, with regard to this interesting subject—the following great and important political maxim:—Every wanton, or causeless, or unnecessary act of authority, exerted, or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well

[b] 4. Bl. Com. 46.

as mental, in the highest possible degree, which can consist with the safety and welfare of the state. "Legum" —I repeat it—"servi sumus, ut *liberi* esse possimus." In the course of my future investigations into this point, I shall be able to evince, in the clearest manner, that our municipal regulations concerning it are not less hostile to the true principles of utility, than they are to those of the superiour law of liberty.

Having made these preliminary observations on a subject, which so greatly needs, and so richly deserves them, I proceed to search the little that is said in some of our systems of criminal law—in others nothing is said—concerning it.

False imprisonment is punishable by indictment, like assaults and batteries; and the delinquent may be fined and imprisoned.[c]

Thus much concerning the crime of violating the personal liberty of man.

Reputation, except that of official characters, seems not, of late times, any more than personal liberty, to have attracted the distinguished regard of our publick law: and even when it deigns a little degree of regard to it, that regard flows from a wrong principle, and is referred to a wrong end. Libels are considered as objects of publick cognizance, not because the character, but because the tranquillity of the citizens is precious to the publick; and therefore, crimes of this nature are classed and prosecuted and punished as breaches of the

[c] 4 Bl. Com. 218. 2. Haw. 90.

peace, and as much resembling challenges to fight.[d] But it was not always so.

I said, on a former occasion,[e] that robbery itself does not flow from a fountain more rankly poisoned, than that which throws out the waters of calumny and defamation. In saying so, I was warranted by authority respectable and ancient. By the laws of the Saxons, the felon, who robbed, was punished less severely than the wretch who calumniated. By a law, made, towards the end of the seventh century, by Lothere, one of the kings of Kent, a calumniator was obliged to pay one shilling to him in whose house or lands he uttered the calumny. It was conceived, it seems, to diffuse a degree of contamination over things inanimate. He was obliged to pay six shillings to the person whom he calumniated, and twelve shillings to the king. When we recollect, that, long *after* this time, a shilling could purchase a fatted ox; we may judge concerning the light, in which defamation was viewed *at* this time. But Edgar the peaceable, who flourished about two centuries afterwards, made, against this crime, a law much more severe: it decreed, that a person convicted of gross and dangerous defamation should have his tongue cut out, unless he redeemed it by paying his full *were*, as it was called, or the price of his life. This law was confirmed by Canute the great.[f]

By the laws of Egypt, a defamer was condemned to the same punishment, which would have been inflicted on the defamed, if the defamation had been true.[g] Solon, in one of his laws, ordained, that a delinquent in slander

[d] 4. Bl. Com. 150.

[e] Vol. 2. p. 472.

[f] 2. Henry. 293.

[g] 1. Gog. Or. L. 58.

should make reparation in money to the party injured; and should also pay a fine into the publick treasury. [h]

A libel may be described—a malicious defamation of any person, published by writing, or printing, or signs, or pictures, and tending to expose him to publick hatred, contempt, or ridicule. [i] It is clearly a crime at the common law. [j]

It has been often observed in the course of these lectures, that one extreme naturally produces its opposite. An unwarrantable attempt made in the star chamber, during the reign of James the first, to wrest the law of libels to the purposes of ministers, and an effort continued ever since to carry that attempt into execution, and even to go beyond some of its worst principles, have, in England, lost to the community the benefits of that law, wise and salutary when administered properly, and by the proper persons. The decision in that case has ever since been considered, in England, as the foundation of the law on this subject. It will be proper, therefore, to examine the parts of that decision with some degree of minuteness.

The libel, prosecuted and condemned, was a satyrical ballad on a deceased archbishop of Canterbury and his living successour. [k]

The first resolution is, that a libel against a magistrate, or other publick person, is a greater offence than one against a private man. This, in the unqualified manner here expressed, cannot be rationally admitted. Other

[h] 1. Pot. Ant. 179.

[i] 1. Haw. 193.

[j] 3. Ins. 174.

[k] 5. Rep. 125 a.

circumstances being equal, that of office ought to incline the beam, if the libel refer to his official character or conduct; because an officer is a citizen and more. But a libel of one kind against a private citizen, may certainly be more atrocious, and of example more atrociously evil, than a libel of another kind against a publick officer.

Another and a more important resolution in that case is—that it is immaterial whether the libel be false or true. This resolution is clearly extrajudicial, because it appears, from the state of the case, that the author of the libel was proceeded against on his own confession. The rule, however, has been followed by more modern determinations; and reasons have been offered to support it on the principles of law. The provocation and not the falsity, says Sir William Blackstone, is the thing to be punished criminally. In a civil action, he admits, a libel must appear to be false as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the publick peace; and, therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the publick peace, is the sole consideration of the law. [1]

Upon this passage, I observe, in the first place, that a libel is a violation of the right of character, and not of the right of personal safety. It is no wonder if the reasonings on this crime are inaccurate, when its very principle is mistaken.

[1] 4. Bl. Com. 150.

I observe, in the second place, that these inaccurate reasonings are attempted to be established by a gross inconsistency. When they refer to the *effects* of the libel, they suppose the tendency to produce disturbances of the peace: when they refer to the *causes* of the libel, they say to him who is actuated by them—you ought, in a settled government, to complain for every injury in the ordinary course of law, and by no means to revenge yourself. [m] Why is not this advice given consistently, to the person provoked by the libel? If he has received an injury—if on that injury a crime is superinduced; the law will repair the former, and punish the latter: if no injury has been sustained, no foundation has been laid for a crime.

I observe, in the third place, that Sir William Blackstone here seems not to have been sufficiently attentive to a principle, which he properly subscribes in another part of his Commentaries: [n] the crime includes an injury: every publick offence is also a private wrong, and somewhat more: it affects the individual, and it likewise affects the community.

The only points, it is said, to be considered in the prosecution for a libel, are, first, the making or publishing of the book or writing: secondly, whether the matter be criminal. [o]

On the last of these two points, a celebrated controversy has subsisted between judges and juries; the former claiming its decision as a question of law; the latter claiming it as a question of fact, or, at least, necessarily

[m] 5. Rep. 125 b. [n] 4. Bl. Com. 5. [o] Id. 151.

involved in the decision of a question of fact. After what I have said, in a former lecture,[p] concerning the general duties and powers of juries, you will be at no loss to know my sentiments on this controverted subject. I only remark, at present, that if a libel be, as I think it is, a crime against the right of reputation; the trial on a libel must be the trial of a character, or some part of a character. Of all questions, almost, which can be proposed, I think this the most remote from a question of law.

The constitution of Pennsylvania has put this matter upon an explicit footing, consonant, or nearly consonant in my opinion, to the true principles of the common law: "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."[q]

The punishment of a libel is a fine, or a fine and corporal punishment.[r]

[p] Vol. 2. p. 336. et seq. [q] Art. 9. s. 7. [r] 1. Haw. 196.

## CHAPTER IV.

### OF CRIMES AGAINST THE RIGHT OF INDIVIDUALS TO PERSONAL SAFETY.

THE crimes which are next to be enumerated and considered are those against the right of personal safety. On this subject, the common law has been peculiarly accurate and attentive.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at nim; by holding up the fist at him; by pointing a pitchfork at him, if he be within its reach; by presenting a gun at him, if he be within the distance to which it will carry; or by any other act of a similar kind, done in an angry and threatening manner. [a] An assault is violence inchoate. [b]

A battery is violence completed by beating another. Any injury done to the person of a man, in an angry, or

[a] 1. Haw. 133. [b] 3. Bl. Com. 120.

revengeful, or rude, or insolent manner, as by touching him in any manner, or by spitting in his face, is a battery in the eye of the law.[c] In that eye, the person of every man is sacred: between the different degrees of violence it is impossible to draw a line: with great propriety, therefore, its very first degree is prohiblted.[d]

Wounding is a dangerous hurt given to another; and is an aggravated species of battery.[e]

These offences may unquestionably be considered as private injuries, for which compensation ought to be decreed to those who suffer them. But viewed in a publick light, they are breaches of the publick peace: as such they may be prosecuted; and as such they may be punished. The punishment is fine, or fine and imprisonment.[f]

A battery or an assault, violence or an offer of violence, is susceptible of deep criminality from the atrocious intention, with which it is sometimes offered or done. An assault with a design to murder, to perpetrate the last outrage upon the honour of the fair sex, or to commit the crime which ought not to be even named—these are instances of what I mention: in these instances, to a heavy fine and imprisonment, it is usual to add the judgment of the pillory.[g]

Assaults, batteries, and woundings may be sometimes excused, and sometimes justified. The particular cases in which this may be done, will be explained with more

[c] 1. Haw. 134. [d] 3. Bl. Com. 120. [e] Id. 121.

[f] 1. Haw. 134. 4. Bl. Com. 217. [g] 4. Bl. Com. 217.

propriety, when we come to consider them as private injuries, and not as publick offences.

Affrays are crimes against the personal safety of the citizens; for in their personal safety, their personal security and peace are undoubtedly comprehended. An affray is a fighting of persons in a publick place, to the terrour of the citizens. They are considered as common nuisances. They may, and ought to be suppressed by every person present; and the law, as it gives authority, so it gives protection, to those who obey its authority in suppressing them, and in apprehending such as are engaged in them; if by every person present; then still more strongly by the officers of peace and justice.[h] In some cases, there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.[i]

To challenge another, by word or letter, to fight a duel, or to be the messenger of such a challenge, or to provoke, or even to endeavour to provoke, another to send such a challenge, is a crime of a very high nature, and is severely reprehended by the law:[j] duels are direct and insolent contempts of the justice of the state.[k]

Affrays are punished by fine and imprisonment, the measure of which must be regulated by the circumstances of the case.[l] For sending a challenge, the offenders have been adjudged to pay a fine, to be imprisoned, to

[h] 3. Ins. 158. 4. Bl. Com. 145. [i] 1. Haw. 135.

[j] 3. Ins. 158. 1. Haw. 135. [k] 1. Haw. 138. [l] Id. ibid.

make a publick acknowledgment of their offence, and to be bound to their good behaviour.

It cannot have escaped your observation, with what a judicious mixture of poignant contempt the common law seasons its indignation against those, who are so lost to true sentiment as to deem it honourable to insult the justice of their country. They are not treated as criminals of dignity: they are considered in the very degraded view of common nuisances: the putrid offals of the shambles are viewed, as we shall see, in the same light.

Neither can it have escaped your observation, with what a deep knowledge of human nature, the common law traces and pursues duels to what is frequently their cowardly as well as their cruel source. Many are vain and base enough to wish and aspire at that importance, which, in their perverted notions, arises from being even the second in a quarrel of this nature, who have not spirit enough to face that danger, which arises from being the first. Hence, often the officious and the insidious offers of friendship, as it is called, on these occasions, by those who, with hearts pusillanimous and malignant, inflame, instead of endeavouring, as those possessed of bravery and humanity would endeavour, to extinguish an unhappy dispute—a dispute, perhaps, unpremeditated as well as unhappy—regretted as well as unintended by the immediate parties—and to rescue them from the consequences of which, without any violation of the rules of true honour, and even without any departure from the rules of false honour, which every one has not the calm courage to violate, nothing is wanting but a conduct diametrically opposite to that of these pretended friends—a conduct which will prevent extremities, without wounding a senti-

ment which, without necessity, ought not to be wounded, because it is delicate though it be mistaken.

Animated with a just degree of blended resentment and disdain against the conduct first described, the common law wisely and humanely extends disgrace and censure and punishment to those who provoke, even to those who *endeavour* to provoke, another to send a challenge.

On the same principles on which affrays are prohibited and punished, riots, routs, and unlawful assemblies are also prohibited and punished by the common law. Two persons may commit an affray; but to a riot, a rout, or an unlawful assembly, three are necessary. A riot is a tumultuous disturbance of the peace by persons unlawfully assembled with a view to execute, and actually executing, some unlawful act, in a violent and turbulent manner, to the terrour of the people.[m] A rout is a riot unfinished; and is committed by persons unlawfully assembled with a view to execute, and actually making a *motion* to execute, an unlawful act, the execution of which would render the riot complete. An unlawful assembly is an unfinished rout; and is committed by persons unlawfully assembled with a view, but without actually making a motion, to execute an unlawful act, to the execution of which, if they had made an actual motion, they would have been guilty of a rout.[n] The punishment of these offences, at the common law, has generally been by fine and imprisonment only: cases, however, very enormous have been punished by the pillory also.[o]

m 1. Haw. 155. Salk. 594. 3. Ins. 176. n 1. Haw. 158.

o Id. 159.

Mayhem is a crime committed by violently depriving one of the use of any part of his body, by losing the use of which he becomes less able, in fighting, to annoy his adversary or to defend himself.[p] This is an atrocious breach of the publick peace and security. By it, one of the citizens is disabled from defending himself; by it, his fellow citizens are debarred from receiving that social aid which they are obliged to give; by it, the state loses those services, which it had a right to exact and expect. In ancient times, this crime was punished according to the law of retaliation: it is now punished with fine and imprisonment.[q]

The forcible abduction or stealing of a person from his country, is a gross violation of the right of personal safety. To this crime the term *kidnapping* is appropriated by the law. It robs the state of a citizen; it banishes the citizen from his country; and it may be productive of mischiefs of the most lasting and humiliating kind. By the common law, it is punished with fine, with imprisonment, and with the pillory.[r]

A rape is an irreparable and a most atrocious aggression on the right of personal safety. Besides the thousand excruciating, but nameless circumstances by which it is aggravated, some may be mentioned with propriety. It is a crime committed not only against the citizen, but against the woman; not only against the common rights of society, but against the peculiar rights of the sex: it is committed by one from whom, on every virtuous and manly principle, her sex is entitled to inviolable protection, and her honour to the most sacred regard.

[p] 1. Haw. 111. [q] 4. Bl. Com. 206. [r] Id. 219.

This crime is one of the selected few, which, by the laws of the Saxons, were punished with death. The same punishment[s] it still undergoes in the commonwealth of Pennsylvania.[t] On this subject, for an obvious reason, particular observations will not be expected from a lecture in the hall: they are fit for the book and the closet only: for even the book and the closest they are fit, only because they are necessary.

The crime not to be named, I pass in a total silence.

I now proceed to consider homicide, and all its different species. Homicide is the generical term used by the law to denote every human act, by which a man is deprived of his life. It may be arranged under the following divisions—enjoined homicide—justifiable homicide—homicide by misfortune—excusable homicide—alleviated homicide—malicious homicide—treasonable homicide.

I. 1. Homicide is enjoined, when it is necessary for the defence of the United States, or of Pennsylvania. At present, it is not necessary for me, and, therefore, I decline to examine the general and very important subject concerning the rights of war. I confine myself merely to that kind of war, which is defensive: and even that kind I now consider solely as a municipal

[s] 1. Laws Penn 135.

[t] By the act of assembly of 22d. April 1794, the punishment of this crime is changed into imprisonment at hard labour, for a period not less than ten, nor more than twenty one years. 3. Laws Penn. 600. *Ed.*

regulation, established by the constitution of the nation, and that of this commonwealth.

The constitution of the nation is ordained to "provide for the common defence." In order to make "provision" for that defence, congress have the power to "provide for arming the militia," and "for calling them forth," "to repel invasions:" they have power "to provide a navy," "to raise and support armies," "to declare war." [u] Whenever the primary object, "the common defence," renders it necessary, the power becomes the duty of congress: and it requires no formal deduction of logick to point to the duty, when necessity shall require, of military bodies, "raised, supported, and armed." In Pennsylvania, it is explicitly declared upon the very point, that "the freemen of this commonwealth shall be armed for its defence." [v]

2. Homicide is enjoined, when it is necessary for the defence of one's person or house.

With regard to the first, it is the great natural law of self preservation, which, as we have seen, [w] cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognised in the constitution of Pennsylvania. [x] "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound," says Mr. Selden, "to keep arms for the preservation of the kingdom, and of their own persons." [y]

[u] Cons. U. S. art. 1. s. 8. [v] Cons. Penn. art. 6. s. 2.

Ante. vol. 2. p. 496. [x] Art. 9. s. 21. [y] Bac. on Gov. 40.

With regard to the second; every man's house is deemed, by the law, to be his castle; and the law, while it invests him with the power, enjoins on him the duty, of the commanding officer. "Every man's house is his castle," says my Lord Coke, in one of his reports, "and he ought to keep and defend it at his peril; and if any one be robbed in it, it shall be esteemed his own default and negligence."[z] For this reason, one may assemble people together in order to protect and defend his house.[a]

3. Homicide is frequently enjoined by the judgment of courts agreeably to the directions of the law. This is the case in all capital punishments. This species of homicide is usually classed with those kinds which are justifiable. The epithet is true so far as it goes. But it goes not far enough to characterize the conduct of the officer to whom it relates. One may be justifiable in doing a thing, in omitting to do which he may be equally justified. But this is not the case with a sheriff, or other ministerial officer of justice. He is *commanded* to do execution.

II. As homicide is enjoined, when a sentence of death is to be executed; so it is sometimes justified in the execution of other process from the courts of justice. When persons, who have authority to arrest, and who use the proper means for that purpose, are resisted in doing so, and the party making resistance is killed in the struggle; this homicide is justifiable.[b] If a person, who interposes to part the combatants in an affray,

[z] 7. Rep. 6. [a] 1. Hale. P. C. 547. 4. Bl. Com. 223.

[b] Eden. 209. Fost. 270. 1. Hale. P. C. 494.

and gives notice to them of his friendly intention, is assaulted by any of them, and, in the struggle, happens to kill; this is justifiable homicide. For, in such cases, it is the duty of every man to interpose, that mischief may be prevented, and the peace may be preserved. This rule is founded in the principles of social duty. [c] If a woman, in defence of her honour, kill him who attempts the last outrage against it; this homicide is justifiable. [d] In the same manner, the husband or father may justify the killing of one, who makes a similar attempt upon his daughter or wife. [e] In these instances of justifiable homicide, the person who has done it is to be acquitted and discharged, with commendation rather than censure. [f]

III. Homicide by misfortune happens, when a man, in the execution of a lawful act, and without intending any harm, unfortunately kills another. [g] The act must not only be lawful, but must also be done in a lawful manner. If a master, correcting his servant moderately, happens to occasion his death, it is only misadventure; for the act of correction was lawful: but it is much otherwise, if he exceed in the manner, the instrument, or the quantity of the correction. [h]

This species of homicide, if found by a jury, still, in strict law, as it is received in England, subjects the unfortunate—I cannot call him the guilty—party, to a forfeiture of his personal estate; or, as some say, only

[c] Fost. 272. Eden. 209.
[d] Fost. 274. Eden. 210.
[e] 4. Bl. Com. 181.
[f] Id. 182. Fost. 279.
[g] Fost. 258.
[h] 4. Bl. Com. 182. Fost. 262.

a part of it. He has, it is true, his pardon, and a writ for restoring his goods, as a matter of course, when he pays the fees for them.[i] Sir William Blackstone seems to make an apology for this forfeiture, by observing, that, in the case of homicide by misadventure, the law presumes negligence, or, at least, a want of sufficient caution, in him who was so unfortunate as to commit it; who, therefore, is not altogether faultless.[j] The law itself is severe in this instance—confessedly so: but the apology for it seems to be founded on a principle, rigorous and totally inadmissible.

Shall the unfortunate be necessarily viewed as also incautious? Shall negligence be presumed by the law, when misadventure has been found by the jury? No. The doctrine is inadmissible. It is rigorous. Accidents of this lamentable kind may be the lot of the wisest and most cautious, and of the best and most humane among men: they most frequently happen among those who are relations or friends; because those associate most frequently together. In such cases, to ascribe the calamity to a conduct "not altogether faultless;" to "presume negligence," when nothing existed but bitter misfortune, would, indeed, be to "heap affliction upon the head of the afflicted," and to stab afresh a heart still bleeding with its former wound. It would be to aggravate the loss of even a brother, a parent, a child, a wife; if of aggravation such a loss, in such circumstances, is susceptible.[k]

The law itself, in this instance, is, as has been mentioned, severe—confessedly so. The fees of office have probably, in this as in too many other instances, prevented

[i] 4. Bl. Com. 188. [j] Id. 186. [k] Fost. 264.

improvement. "I therefore think," to use the expressions of a great master of criminal law, "those judges, who have taken general verdicts of acquittal in plain cases of homicide by misfortune, have not been to blame. They have, to say the worst, deviated from ancient practice in favour of innocence, and have prevented an expense of time and money, with which an application to the great seal, though in a matter of course, as this undoubtedly is, must be constantly attended."[l] It is proper to observe that this late practice of the judges is mentioned by Sir William Blackstone, in terms which intimate his approbation.[m]

IV. Excusable homicide is that which, on a sudden affray[n] between parties, is given in the necessary defence of him who wishes and endeavours to quit the combat. This is carefully to be distinguished, because it is materially different, from that kind of self defence which is justified or enjoined to prevent the perpetration of the most atrocious outrage upon one's person or habitation.[o]

The species of homicide, which we are now to consider, though excusable by the benignity of the law, is still culpable. It is done, when a person, engaged in a sudden affray, quits the combat before a mortal wound is given, and retreats or flies as far as he can with safety; and then, urged by mere necessity, kills his adversary for the preservation of his own life.[p] This species approaches near to manslaughter; and, in experience, the boundary between them is, in some places, difficult to be

[l] Fost. 288. [m] 4. Bl. Com. 188. [n] Fost. 276.

[o] 4. Bl. Com. 183. [p] Fost. 275.

discerned: it is marked, however, in the consideration of law. In both species, it is supposed that passion has kindled on each side; and that blows have passed between the parties. But in the case of manslaughter, either the combat on both sides continues till the mortal stroke is given, or the party giving it is not in imminent danger: whereas, in the case of excusable homicide, he who is excused declines, before a mortal stroke given, any further combat, and retreats as far as he can with safety; and then, through mere necessity, and to avoid immediate death, kills his adversary. [q]

Though this species of homicide is very different from that which happens by misfortune; yet the judges, in one as well as the other, permit, if not direct, a general verdict of acquittal. [r]

V. To alleviated homicide, the term *manslaughter* is appropriated. When the epithet *alleviated* is applied to this species of homicide, it must be understood only as compared with that which is malicious: for manslaughter, though in this view an alleviated, is a felonious homicide. It is the unlawful killing of another, without malice; and may be either voluntarily, upon a sudden heat or provocation; or involuntarily, but in the commission of some unlawful act. When manslaughter is voluntary, it is distinguished from excusable homicide by this criterion—that, in the latter case, the killing is through necessity, and to avoid immediate death; whereas, in the former, there is no necessity at all; it being a sudden act of revenge. When manslaughter is involuntary, it is distinguished from homicide by misfortune by this criterion—

[q] Fost. 275. 277. 4. Bl. Com. 185. [r] 4. Bl. Com. 188.

that the latter always happens in consequence of a lawful, the former, in consequence of an unlawful act. Manslaughter, both voluntary and involuntary, is distinguished from malicious homicide by this criterion—that the latter is with, the former without, malice.

In England, manslaughter is punished by burning in the hand, and by the forfeiture of goods and chattels.[s] In the United States, it is punished by a fine not exceeding one thousand dollars, and by imprisonment not exceeding three years.[t] In Pennsylvania,[u] it is punished by a fine at the discretion of the court, and by imprisonment not exceeding two years; and the offender shall find security for his good behaviour during life.[v]

VI. To malicious homicide the term *murder* is appropriated by the law. This name was, in ancient times, applied only to the *secret* killing of another; for which

[s] 4. Bl. Com. 193. [t] Laws U. S. 1. cong. 2. sess. c. 9. s. 7.

[u] 1. Laws. Penn. 846.

[v] The punishment of *voluntary* manslaughter, by the act of 22d April, 1794, (3. Laws. Penn. 601. s. 7.) is, for the first offence, imprisonment at hard labour, not less than two, nor more than ten years; and the offender shall be sentenced likewise to give security for his good behaviour during life, or for any less time, according to the nature and enormity of the offence. For the second offence, he shall be imprisoned as aforesaid not less than six, nor more than fourteen years. In cases of *involuntary* manslaughter, the prosecutor for the commonwealth may, with the leave of the court, wave the felony, and charge the person with a misdemeanor; who, on conviction, shall be fined and imprisoned as in cases of misdemeanor; or the prosecutor may charge both offences in the indictment; and the jury may in such case acquit the party of one, and find him guilty of the other charge. 3. Laws. Penn. 601. s. 8. *Ed.*

the vill or hundred where it was committed was heavily amerced. This amercement was called *murdrum*. This expression is now applied to the crime; and the crime is now considered in a very different, and much more extensive point of view, without regarding whether the person killed was killed openly or secretly. [w]

Murder is the unlawful killing of another with malice aforethought, express or implied. [x] The distinction, you observe, which is strongly marked between manslaughter and murder is, that the former is committed without, the latter with malice aforethought. It is essential, therefore, to know, clearly and accurately, the true and legal import of this characteristick distinction.

There is a very great difference between that sense which is conveyed by the expression *malice* in common language, and that to which the term is appropriated by the law. In common language, it is most frequently used to denote a sentiment or passion of strong malevolence to a particular person; or a settled anger and desire of revenge in one person against another. In law, it means the dictate of a wicked and malignant heart; of a depraved, perverse, and incorrigible disposition. Agreeably to this last meaning, many of the cases, which are arranged under the head of implied malice, will be found to turn upon this single point, that the fact has been attended with such circumstances—particularly the circumstances of deliberation and cruelty concurring—as betray the plain indications and genuine symptoms of a mind grievously depraved, and acting from motives highly criminal; of a heart regardless of social duty, and delibe-

[w] 4. Bl. Com. 195. [x] 3. Ins. 47.

rately bent upon mischief. This is the true notion of malice, in the legal sense of the word. The mischievous and vindictive spirit denoted by it, must always be collected and inferred from the circumstances of the transaction. On the circumstances of the transaction, the closest attention should, for this reason, be bestowed. Every circumstance may weigh something in the scale of justice.

In England, in the United States, in Pennsylvania, and almost universally throughout the world, the crime of wilful and premeditated murder is and has been punished with death. Indeed it seems agreed by all, that, if a capital punishment ought to be inflicted for any crimes, this is unquestionably a crime for which it ought to be inflicted. Those who think that a capital punishment is enjoined against this crime by the law which is divine, will not imitate the conduct of that Polish monarch, who remitted to the nobility the penalties of murder, in a charter of pardon beginning arrogantly thus [y]—"Nos divini juris rigorem moderantes, &c." [z]

[y] 4. Bl. Com. 194.

[z] Murder, by the act of 22d April, 1794, is distinguished into two degrees. Murder of the first degree alone is punished with death, and is the only capital crime now known to the laws of Pennsylvania. Murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, is deemed murder of the first degree. All other kinds of murder are deemed murder in the second degree. The punishment of this is imprisonment at hard labour, for a period not less than five, nor more than eighteen years. 3. Laws. Penn. 599. 600. s. 1. 2. 4. *Ed.*

VII. Treasonable homicide is committed by a servant who kills his master, and a wife, who kills her husband. Petit treason is the name appropriated, by the law, to this crime. It arises from the relation which subsists between the person killing and the person killed. The crime which committed by another, would be murder, is petit treason when committed by the wife, or by a servant.

The punishment of this crime, in England, is, that the man is drawn and hanged; and the woman is drawn and burned. [a] By a law [b] still in force in Pennsylvania, persons convicted of this crime, or of murder, shall suffer as the laws of Great Britain now do or hereafter shall direct and require in such cases respectively. [c]

[a] 4. Bl. Com. 204. [b] 1. Laws. Penn. 135.

[c] "Every person liable to be prosecuted for petit treason shall in future be indicted, proceeded against, and punished, as is directed in other kinds of murder." Act of 22d April, 1794. s. 3. 3. Laws Penn. 600. *Ed.*

## CHAPTER V.

### OF CRIMES, IMMEDIATELY AGAINST THE COMMUNITY.

I HAVE hitherto considered crimes, which wound the community through the sides of individuals: I now come to consider one which directly and immediately aims a stab at the vitals of the community herself. I mean treason against the United States, and against the state of Pennsylvania.

Treason is unquestionably a crime most dangerous to the society, and most repugnant to the first principles of the social compact. It must, however, be observed, that as the crime itself is dangerous and hostile to the state, so the imputation of it has been and may be dangerous and oppressive to the citizens. To the freest governments this observation is by no means inapplicable; as might be shown at large by a deduction, historical and political, which would be both interesting and instructive. But, at present, we have not time for it.

To secure the state, and at the same time to secure the citizens—and, according to our principles, the last is the end, and the first is the means—the law of treason should possess the two following qualities. 1. It should be determinate. 2. It should be stable.

It is the observation of the celebrated Montesquieu,[a] that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power. In monarchies, and in republicks, it furnishes an opportunity to unprincipled courtiers, and to demagogues equally unprincipled, to harass the independent citizen, and the faithful subject, by treasons, and by prosecutions for treasons, constructive, capricious, and oppressive.

In point of precision and accuracy with regard to this crime, the common law, it must be owned, was grossly deficient. Its description was uncertain and ambiguous; and its denomination and penalties were wastefully communicated to offences of a different and inferiour kind. To lop off these numerous and dangerous excrescences, and to reduce the law on this important subject to a designated and convenient form, the famous statute of treasons was made in the reign of Edward the third, on the application of the lords and commons. This statute has been in England, except during times remarkably tyrannical or turbulent, the governing rule with regard to treasons ever since. Like a rock, strong by nature, and fortified, as successive occasions required, by the able and the honest assistance of art, it has been impregnable by all the rude and boistrous assaults, which have been

[a] Sp. L. b. 12. c. 7.

made upon it, at different quarters, by ministers and by judges; and as an object of national security, as well as of national pride, it may well be styled the legal Gibraltar of England.

Little of this statute, however, demands our minute attention now; as the great changes in our constitutions have superceded all its monarchical parts. One clause of it, indeed, merits our strictest investigation; because it is transcribed into the constitution of the United States. Another clause in it merits our strongest regard; because it contains and holds forth a principle and an example, worthy of our observance and imitation.

After having enumerated and declared all the different species of treason, which it was thought proper to establish, the statute proceeds in this manner: "and because many other cases of like treason may happen in time to come, which, at present, a man cannot think or declare; it is assented, that if any other case, supposed treason, which is not specified above, happen before any judges, they shall not go to judgment in such case; but shall tarry, till it be shown and declared before the king and his parliament, whether it ought to be judged treason or other felony."

The great and the good Lord Hale observes [b] upon this clause, "the great wisdom and care of the parliament, to keep judges within the bounds and express limits of this statute, and not to suffer them to run out, upon their own opinions, into constructive treasons, though in cases which seem to have a parity of reason"

[b] 1. Hale. P. C. 259.

—cases of like treason—" but reserves them to the decision of parliament. This," he justly says, " is a great security as well as direction to judges; and a great safeguard even to this sacred act itself."

It is so. And it was all the safeguard which the parliament, by the constitution, as it is called, of England, could give. It was a safeguard from the arbitrary constructions of courts: it was a shelter from judicial storms: but it was no security against legislative tempests. No parliament, however omnipotent, could bind its successours, possessed of equal omnipotence; and no power, higher than the power of parliament, was then or is yet recognised in the juridical system of England. What was the consequence? In the very next reign, the fluctuating and capricious one of Richard the second, the parliaments were profuse, even to ridicule—if, in such a serious subject, ridicule could find a place—in enacting new, tyrannical, and even contradictory treasons. This they did to such an abominable degree, that, as we are told by the first parliament which met under his successour, " there was no man who knew how he ought to behave himself, to do, speak, or say, for doubt of the pains of such treasons." [c]

In the furious and sanguinary reign of Henry the eighth, the malignant spirit of inventing treasons revived, and was carried to such a height of mad extravagance, that, as we have seen on another occasion, the learned as well as the unlearned, the cautious as well as the unwary, the honest as well as the vicious, were entrapped in the snares. How impotent, as well as cruel and in-

[c] St. 1. Hen. 4. c. 10.

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consistent, is tyranny in the extreme! His savage rage recoiled, at some times, upon those who were most near to him; at other times, with more justice, upon himself. The beautiful and amiable Boleyn became the victim of that very law, which her husband, in his fit of lustful passion—for the monster was callous to *love*—made for her security. When the enormities of his life and reign were drawing towards their end, his physicians saw their tyrant in their patient; and they refused to apprize him of his situation, because he had made it treason to predict his death.

Admonished by the history of such times and transactions as these, when legislators are tyrants or tools of tyrants; establishing, under their own control, a power superiour to that of the legislature; and availing themselves of that power, more permanent as well as superiour; the people of the United States have wisely and humanely ordained, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [d]

In this manner, the citizens of the Union are secured effectually from even legislative tyranny: and in this instance, as in many others, the happiest and most approved example of other times has not only been imitated, but excelled. This single sentence comprehends our whole of national treason; and, as I mentioned before, is transcribed from a part of the statute of Edward the third. By those who proposed the national constitution, this was done, that, in a subject so essentially interesting to each

[d] Con. U. S. art. 3. s. 3.

and to all, not a single expression should be introduced, but such as could show in its favour, that it was recommended by the mature experience, and ascertained by the legal interpretation, of numerous revolving centuries.

To the examination, and construction, and well designated force of those expressions, I now solicit your strict attention.

"Treason consists in levying war against the United States." In order to understand this proposition accurately and in all its parts, it may be necessary to give a full and precise answer to all the following questions. 1. What is meant by the expression "levying war?" 2. By whom may the war be levied? 3. Against whom must it be levied?

To each of these questions I mean to give an answer—if possible, a satisfactory answer; but not in the order, in which they are proposed. I begin with the second—by whom may the war spoken of be levied? It is such a war as constitutes treason. The answer then is this: the war must be levied by those who, while they levy it, are at the same time guilty of treason. This throws us back necessarily upon another question—who may commit treason against the United States? To this the answer is—those who owe obedience to their authority. But still another question rises before us—who are they that owe obedience to that authority? I answer—those who receive protection from it. In the monarchy of Great Britain, protection and allegiance are universally acknowledged to be rights and duties reciprocal. The same principle reigns in governments of every kind. I use here the expression *obedience* instead of the expression *alle-*

*giance*; because, in England, allegiance is considered as due to the natural, [c] as well as to the moral person of the king; to the man, as well as to the represented authority of the nation. In the United States, the authority of the nation is the sole object on one side. An object strictly corresponding to that, should be the only one required on the other side. The object strictly corresponding to authority is, obedience to that authority. I speak, therefore, with propriety and accuracy unexceptionable, when I say, that those who owe obedience to the authority, are such as receive the protection, of the United States.

This close series of investigation has led us to a standard, which is plain and easy, as well as proper and accurate—a standard, which every one can, without the possibility of a mistake, discover by his experience, as well as by his understanding—by what he enjoys, as well as by what he sees. Every one has a monitor within him, which can tell whether he feels protection from the authority of the United States: if he does, to that authority he owes obedience. On the political, as well as on the natural globe, every point must have its antipode. Of obedience the antipode is treason.

I have now shown, by whom the war may be levied. On this subject, a great deal of learning, historical, legal, and political, might be displayed; and changes might easily be rung on the doctrines of natural, and local, and temporary, and perpetual allegiance. I purposely avoid them. The reason is, that so much false is blended with so little genuine intelligence, as to render any discovery you would make an inadequate compensation for your

[c] 1. Bl. Com. 371.

trouble in searching for it. The rights and duties of protection and obedience may, I think, in a much more plain and direct road, be brought home to the bosom and the business of every one.

I now proceed to another question—what is meant by the expression "levying war?" From what has been said in answer to the former question, an answer to this is so far prepared as to inform us, that the term *war* cannot, in this place, mean such a one as is carried on between independent powers. The parties on one side are those who owe obedience. All the curious and extensive learning, therefore, concerning the laws of war as carried on between separate nations, must be thrown out of this question. This is such a war as is levied by those who owe obedience—by citizens; and therefore must be such a war, as, in the nature of things, citizens can levy.

The indictments for this treason generally describe the persons indicted as "arrayed in a warlike manner." As where people are assembled in great numbers, armed with offensive weapons, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march with banners displayed, or with drums or trumpets: whether the greatness of their numbers and their continuance together doing these acts may not amount to being arrayed in a warlike manner,[f] deserves consideration. If they have no military arms, nor march or continue together in the posture of war; they may be great rioters, but their conduct does not always amount to a levying of war.[g]

[f] 1. Hale. P. C. 131. 150.

[g] Id. 131.

If one, with force and weapons invasive or defensive, hold and defend a castle or fort against the publick power; this is to levy war. So an actual insurrection or rebellion is a levying of war, and by that name must be expressed in the indictment.[h]

But this question will receive a farther illustration from the answer to the third question; because the fact of levying war is often evinced more clearly from the purpose for which, than from the manner in which, the parties assemble. I therefore proceed to examine the last question—against whom must the war be levied? It must be levied against the United States.

The words of the statute of treasons are, "If any one levy war against the king." I have before observed that, in England, allegiance is considered as due to the natural, as well as to the moral person of the king. This part of the statute of treasons has been always understood as extending to a violation of allegiance in both those points of view—to the levying of war not only against his person, but also against his authority or laws.[i] The levying of war against the United States can, for the reasons already suggested, be considered only in the latter view.

The question now arising is the following—Is such or such a war levied against the United States? This question, as was already intimated, will be best answered by considering the intention with which it was levied.[j] If it is levied on account of some *private* quarrel, or to

[h] 3. Ins. 10.

[i] 1. Haw. 37. 4. Bl. Com. 81. Fost. 211.

[j] Fost. 208.

take revenge of particular persons, it is not a war levied against the United States.[k] A rising to maintain a *private* claim of right; to break prisons for the release of *particular* persons, without any other circumstance of aggravation; or to remove nuisances which affect, or are thought to affect, in point of interest, the parties who assemble—this is not a levying of war against the United States.[l] Insurrections in order to throw down *all* inclosures, to open *all* prisons, to enhance the price of *all* labour, to expel foreigners in general, or those from any single nation living under the protection of government, to alter the established law, or to render it ineffectual—insurrections to accomplish these ends, by numbers and an open and armed force, are a levying of war against the United States.[m]

The line of division between this species of treason and an aggravated riot is sometimes very fine and difficult to be distinguished. In such instances, it is safest and most prudent to consider the case in question as lying on the side of the inferiour crime.[n]

Treason consists in "adhering to the enemies of the United States, giving them aid and comfort." By enemies, are here understood the citizens or subjects of foreign princes or states, with whom the United States are at open war. But the subjects or citizens of such states or princes, in actual hostility, though no war be solemnly declared, are such enemies.[o] The expressions "giving them aid and comfort" are explanatory of what is meant

[k] Fost. 209. [l] Id. 210. [m] Id. 211. 213.

[n] 1. Hale. P. C. 146. [o] Fost. 219.

by adherence. To give intelligence to enemies, to send provisions to them, to sell arms to them, treacherously to surrender a fort to them, to cruise in a ship with them against the United States—these are acts of adherence, aid, and comfort. [p]

To join with rebels in a rebellion, or with enemies in acts of hostility, is treason in a citizen, by adhering to those enemies, or levying war with those rebels. But if this be done from apprehension of death, and while the party is under actual force, and he take the first opportunity which offers to make his escape; this fear and compulsion will excuse him. [q]

In England, the punishment of treason is terrible indeed. The criminal is drawn to the gallows, and is not suffered to walk or be carried; though usually a hurdle is allowed to preserve him from the torment of being dragged on the ground. He is hanged by the neck, and is then cut down alive. His entrails are taken out and burned, while he is yet alive. His head is cut off. His body is divided into four parts. His head and quarters are at the disposal of the king. [r]

In the United States and in Pennsylvania, [s] treason is punished in the same manner as other capital crimes.

[p] Fost. 217. 1. Haw. 38. 4. Bl. Com. 82.

[q] Fost. 216. [r] 4. Bl. Com. 92.

[s] Treason against the state is now punished by imprisonment at hard labour, for a period not less than six, nor more than twelve years. 3. Laws Penn. 600. For the description of treason against the state, see 1. Laws Penn. 726. 2. Laws Penn. 83. *Ed.*

A traitor is hostile to his country: a pirate is the enemy of mankind—*hostis humani generis.*

Piracy is robbery and depredation on the high seas; and is a crime against the universal law of society. By declaring war against the whole human race, the pirate has laid the whole human race under the necessity of declaring war against him. He has renounced the benefits of society and government: he has abandoned himself to the most savage state of nature. The consequence is, that, by the laws of self defence, every community has a right to inflict upon him that punishment, which, in a state of nature, every individual would be entitled to inflict for any invasion of his person or his personal property. [t]

"If any person," says a law of the United States, "shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punished with death; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted shall suffer death." [u]

By the ancient common law, piracy committed by a subject was deemed a species of treason. [v] According to that law, it consists of such acts of robbery and de-

[t] 4. Bl. Com. 71.

[u] Laws U. S. 1. con. 1. sess. c. 9. s. 8. [v] 4. Bl. Com. 71.

predation upon the high seas, as, committed on the land, would amount to a felony there.[w] The law of general society, as well as the law of nations, is a part of the common law.[x]

[w] 4. Bl. Com. 72. [x] Id. 73.

## CHAPTER VI.

### OF CRIMES, AFFECTING SEVERAL OF THE NATURAL RIGHTS OF INDIVIDUALS.

THOSE crimes and offences of which I have already treated, attack some *one* of the natural rights of man or of society: there are other crimes and offences, which attack *several* of those natural rights. Of these, nuisances are the most extensive and diversified.

A nuisance denotes any thing, which produces mischief, injury, or inconvenience. It is divided into two kinds—common and private. [a] The latter will be treated under the second division of my system: it is a damage to property. Common nuisances are a collection of personal injuries, which annoy the citizens generally and indiscriminately—so generally and indiscriminately, that it would be difficult to assign to each citizen his just pro-

[a] 3. Bl. Com. 216. 4. Bl. Com. 166.

portion of redress; and yet, on the whole, so "noisome," that publick peace, and order, and tranquillity, and safety require them to be punished or abated.

On this subject, and, I believe, on this subject alone, the common law makes no distinction between a person and a thing. The exquisite propriety, with which the distinction is lost in this subject, proves strongly the importance of preserving it in every other. The exception establishes the rule.

How degraded are persons when they deserve to be classed with things! We have seen, on a former occasion,[b] that—1. The duellists and the promoters of duels are ranked with the offals of the shambles. The station is, indeed, a most humiliating one. Let no station, however, yield to absolute despair. From the very lowest depression, as well as from the very highest exaltation, there is a return in a contrary course. In pure compassion for the degraded hero, let us give him at least one grade of promotion. Perhaps, by vigorous exertion, he may become qualified for his advanced dignity. The quarreller or promoter of quarrels of one sex, may behave so as to reflect no great disgrace on the common scold of the other. She, too, is a common nuisance.

2. A common scold, says the law, is a publick nuisance to her neighbourhood: as such she may be indicted, and, if convicted, shall be placed in a certain engine of correction, called the trebucket, castigatory, or *cucking* stool; which, in the Saxon language, signifies the scolding stool; though now it is frequently corrupted into *ducking* stool;

[b] Ante. p. 80.

because the residue of the sentence against her is, that when she is thus placed, she shall be plunged in the water —for the purpose of prevention, it is presumed, as well as of punishment.

Our modern man of gallantry would not surely decline the honour of her company. I therefore propose humbly, that, in future, the cucking stools shall be made to hold double.

3. Eaves droppers too, another set of honourable associates—such as listen under walls, or windows, or eaves of a house, in order to hear the discourse of the family, and from that discourse to frame tales, mischievous and slanderous—these are common nuisances: they may be indicted as such; and as such may be punished by fine and finding sureties for their good behaviour. [d]

It is whispered to me, that the expression "eaves droppers" must refer to a very early and a very simple state of society, when people lived in cabins or huts: because, when people live in three story houses, it would be rather awkward to listen at their eaves in order to learn the secrets of families. It is therefore suggested, that, as the common law is remarkable for its adroitness in accommodating itself to the successive manners of succeeding ages, a small alteration should be made in the description of this nuisance, in order to suit it to the present times; and that the tea table should be substituted in the place of the eaves of the house. I declare I have not the remotest objection to the proposal; provided the wine tables, whenever they merit it, be of the party.

[c] 4. Bl. Com. 169. [d] Id. ibid.

4. To keep hogs in any city or market town is a common nuisance. [e]

5. Disorderly houses are publick nuisances; and, upon indictment, may be suppressed and fined. [f]

6. Every thing offensive and injurious to the health of a neighbourhood is a common nuisance; is liable to a publick prosecution; and may be punished by fine according to the quantity of the misdemeanor. [g]

7. Annoyances in highways, bridges, and publick rivers are likewise common nuisances. [h] Other kinds might be enumerated.

Indecency, publick and grossly scandalous, may well be considered as a species of common nuisance: it is certainly an offence, which may be indicted and punished at the common law. [i]

Profaneness and blasphemy are offences, punishable by fine and by imprisonment. Christianity is a part of the common law. [j]

[e] 4. Bl. Com. 167. [f] Id. ibid. [g] Id. ibid. [h] Id. ibid.

[i] 1. Haw. 7. 1. Sid. 168. Wood. Ins. 412.

[j] 2. Str. 834. 4. Bl. Com. 59.

## CHAPTER VII.

### OF CRIMES AGAINST THE RIGHTS OF INDIVIDUALS ACQUIRED UNDER CIVIL GOVERNMENT.

UNDER civil government, one is entitled not only to those rights which are natural; he is entitled to others which are acquired. He is entitled to the honest administration of the government in general: he is entitled, in particular, to the impartial administration of justice. Those rights may be infringed: the infringements of them are crimes. These we next consider.

1. Extortion is the taking of money by any officer, by colour of his office, either where none is due, or where less is due, or before it is due. At common law, this crime may be severely punished by fine and imprisonment, and by a removal from the office, in the execution of which it was committed.[a]

[a] 1. Haw. 170. 171.

2. Oppression under colour of office is a crime of still more extensive and of still more malignant import. Tyrannical partiality is generally its infamous associate. These, at the common law, may be punished with fine, with imprisonment, with forfeiture of office, and with other discretionary censure regulated by the nature and the aggravations of the crimes. [b]

By a law of the United States, it is enacted, that if any supervisor or other officer of inspection of the excise shall be convicted of extortion or oppression in the execution of his office; he shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court; and shall also forfeit his office. [c]

3. Even negligence in publick offices, if gross, will expose the negligent officers to a fine; and, in very notorious cases, to a forfeiture of office. [d]

4. Embracery is an attempt to influence a jury corruptly, by promises, persuasions, entreaties, money, or entertainments. The person embracing is punished by fine and imprisonment. The yielding juror is distinguished by superiour punishment. [e]

5. Bribery is, when a judge, or other person employed in the administration of justice, takes any undue reward to influence his behaviour in office. At common law,

[b] 4. Bl. Com. 140.

[c] Laws U. S. 1. cong. 3. sess. c. 15. s. 39.

[d] 1. Haw. 168. [e] 4. Bl. Com. 140.

bribery, in him who offers, in him who gives, and in him who takes the bribe, is punished with fine and imprisonment. In high offices, the punishment has deservedly been higher still.[f]

Bribery also signifies sometimes the taking or the giving of a reward for an office of a publick nature. Nothing, indeed, can be more palpably pernicious to the publick, than that places of high power and high trust should be filled, not by those who are wise and good enough to execute them, but by those who are unprincipled and rich enough to purchase them.[g]

By a law of the United States, if any person shall give a bribe to a judge for his judgment in a cause depending before him; both shall be fined and imprisoned at the discretion of the court; and shall for ever be disqualified to hold any office of honour, trust, or profit under the United States.[h]

6. Perjury is a crime committed, when a lawful oath is administered in some judicial proceeding, by one who has authority, to a person who swears absolutely and falsely, in a matter material to the issue or cause in question.[i]

An oath, says my Lord Coke, is so sacred, and so deeply concerns the consciences of men, that it cannot be administered to any one, unless it be allowed by the common law, or by act of parliament; nor by any one,

[f] 4. Bl. Com. 139.

[g] 1. Haw. 168.

[h] Laws U. S. 1. cong. 2. sess. c. 9. s. 21.

[i] 3. Ins. 164.

who has not authority by common law, or by act of parliament: neither can any oath allowed by the common law, or by act of parliament, be altered, unless by act of parliament.[k] For these reasons, it is much to be doubted whether any magistrate is justifiable in administering voluntary affidavits, unsupported by the authority of law. It is more than possible, that, by such idle baths, a man may frequently incur the guilt, though he evade the temporal penalties of perjury.

It is a part of the foregoing definition of perjury, that it must be when the person swears *absolutely*. In addition to this, it has been said, that the oath must be direct, and not as the deponent thinks, or remembers, or believes.[l] This doctrine has, however, been lately questioned; and, it seems, on solid principles. When a man swears, that he believes what, in truth, he does not believe, he pronounces a falsehood as much, as when he swears absolutely that a thing is true, which he knows not to be true. My Lord Chief Justice De Grey, in a late case, said, that it was a mistake, which mankind had fallen into, that a person could not be convicted of perjury for deposing on oath according to his belief.[m] It is certainly true, says my Lord Mansfield, that a man may be indicted for perjury, in swearing that he believes a fact to be true, which he must know to be false.[n]

At common law, the punishment of perjury has been very various. Anciently it was punished with death; afterwards with banishment, or cutting out the tongue;

[k] 3. Ins. 165. [l] Id. 166. 1. Haw. 175. [m] Leach. 304.

[n] Leach 304.

afterwards by forfeiture; now by fine and imprisonment, and incapacity to give testimony. To these last mentioned punishments, that of the pillory is added by a law of the [p] United States. [q]

7. Subornation of perjury is the crime of procuring another to take such a false oath as constitutes perjury. It is punished as perjury. [r]

8. Conspiracy is a crime of deep malignity against the administration of justice. Not only those, who falsely and maliciously cause an innocent man to be indicted and tried, are properly conspirators; but those also are such, who *conspire* to indict a man falsely and maliciously, whether they do or do not any act in the prosecution of the conspiracy. [s] From the description of this crime it is obvious, that at least two persons are necessary to constitute it. [t]

He who is convicted of a conspiracy to accuse another of a crime which may touch his life, shall have the following judgment pronounced against him: that he shall lose *liberam legem*, the freedom and franchise of the law,

[o] 4. Bl. Com. 137. [p] 1. cong. 2. sess. c. 9. s. 18.

[q] By a late act of assembly in Pennsylvania (6. Laws Penn. 513.) it is provided, that persons convicted of perjury, or subornation of perjury, shall forfeit and pay any sum not exceeding five hundred dollars, and suffer imprisonment and be kept at hard labour during any term not exceeding seven years; and further, shall thereafter be disqualified from holding any office of honour, trust, or profit in the commonwealth, and from being admitted as a legal witness in any cause. *Ed.*

[r] 4. Bl. Com. 137. [s] 1. Haw. 189. [t] Id. 192.

by which he is disqualified to be a juror or a witness, or even to appear in a court of justice: that his houses and lands and goods shall be forfeited during his life: that his trees shall be rooted up, his lands shall be wasted, his houses shall be rased, and his body shall be imprisoned. This is commonly called the villainous judgment: and is given by the common law.[u] By that law, all confederacies whatever wrongfully to prejudice a third person are highly criminal.[v]

9. Common barratry is another offence against the administration of justice. A common barrator is a common mover, or exciter, or maintainer of suits or quarrels, either in courts, or in the country. One act only will not constitute a barrator. He must be charged as a common barrator.[w] He is the common nuisance of society under a civil government.

A common barrator is to be fined, imprisoned, and bound to his good behaviour: if he be of the profession of the law, he is also to be further punished by being disabled, in future, to practise.[x]

10. At common law, the embezzling, defacing, or altering of any record, without due authority, was a crime highly punishable by fine and imprisonment.[y]

By a law of the United States, if any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceedings

[u] 1. Haw. 193. [v] Id. 190. [w] Id. 243.
[x] Id. 244. [y] Id. 112.

in any of the courts of the United States, by means of which any judgment shall be reversed, made void, or not take effect; such person shall be fined not exceeding five thousand dollars, or imprisoned not exceeding seven years, and whipped not exceeding thirty nine stripes. [z]

11. To obstruct the execution of lawful process, is a crime of a very high and presumptuous nature: to obstruct an arrest upon criminal process, is more particularly so. It has been holden, that the party opposing such an arrest becomes a partner in the crime—an accessory in felony, and a principal in treason. [a]

By a law of the United States, if any person shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States in serving or attempting to serve any mesne process or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever; or shall assault, beat, or wound any officer, or other person duly authorized, in serving or executing any such writ, rule, order, process, or warrant; he shall be imprisoned not exceeding twelve months, and fined not exceeeding three hundred dollars. [b]

12. When one is arrested upon a criminal process, it is an offence even to escape from custody; and this offence may be punished by fine and imprisonment. [c] But if an

[z] Laws U. S. 1. cong. 2. sess. c. 9. s. 15.
[a] 4. Bl. Com. 129. 2. Haw. 121.
[b] Laws U. S. 1. cong. 2. sess. c. 9. s. 22.
[c] 2. Haw. 122.

officer, or a private person,[d] who has the custody of another, permits him to escape, either by negligence, or, still more, by connivance; such officer or private person is culpable in a much higher degree. He has not the natural desire of liberty to tempt—he has official obligations to prevent it. If he permits it through negligence, he may be punished by fine: if he permits it by consent or connivance, his conduct is generally agreed to amount to the same kind of crime, and to deserve the same degree of punishment, as the crime of which the prisoner is guilty, and for which he is committed; whether trespass, or felony, or treason.[e]

13. To break a prison was, at the common law, a capital crime, whatever might have been the cause, for which the person breaking it was committed. The reason assigned was—interest reipublicæ ut carceres sint in tuto.[f] Seldom is there reason to complain of the common, as of a rigorous law. In this instance, however, there is unquestionably reason for complaint. The Mirrour complains of it as a hard law. Its severity was moderated by a statute made in the reign of Edward the second.[g] By that statute, the breaking of a prison is not a capital crime, unless the party breaking it was committed for a capital crime. But to break prison, when lawfully committed for an inferiour offence, is a misdemeanor, and may be punished with fine and imprisonment.[h]

14. A rescue is the freeing of another, by force, from imprisonment, or from an arrest. In the person rescuing,

[d] 2. Haw. 138. [e] Id. 134. 1. Hale. P. C. 590.
[f] 2. Ins. 589. [g] Id. ib. St. 1. Ed. 2. s. 2.
[h] 2. Haw. 128. 4. Bl. Com. 131.

it is generally the same crime, as a breach of prison would have been in the person breaking it. There is, however, one exception: a person, who is committed for treason and breaks the prison, is guilty of felony only: he, who rescues him, is guilty of treason.[i]

By a law of the United States,[j] if any person rescue one convicted of a capital crime, the person rescuing shall be punished capitally: if he rescue one committed, for, but not convicted of a capital crime, or one committed for, or convicted of a crime not capital; he shall be fined not exceeding five hundred dollars, and imprisoned not exceeding one year.

15. Offences against the courts, have always been considered as offences against the administration of justice. By the ancient common law before the conquest, to strike or to draw a sword in them, was a capital crime:[k] and the law still retains so much of the ancient severity, as only to exchange the loss of life for that of the offending limb.

If, while the courts in Westminster hall are sitting; or if, before justices of assize, or justices of oyer and terminer, any one shall draw a weapon upon any judge, though he strike not; or if he strike a juror or any other person, with or without a weapon; he shall lose his right hand, shall forfeit all his goods and all the profits of his lands during his life, and shall suffer perpetual imprisonment.[l]

[i] 2. Haw. 139. 140.

[j] 1. Cong. 2. sess. c. 9. s. 23.

[k] 3. Ins. 140.

[l] 1. Haw. 57. 3. Ins. 140.

## CHAPTER VIII.

### OF THE PERSONS CAPABLE OF COMMITTING CRIMES; AND OF THE DIFFERENT DEGREES OF GUILT INCURRED IN THE COMMISSION OF THE SAME CRIME.

I HAVE now enumerated the crimes and offences known to the common law; and have stated their punishments, as inflicted either by that law, or by positive statutes of the United States or of Pennsylvania.

When we come to a retrospect of this enumeration of crimes and punishments, we shall find that it is fruitful of much instruction, both of the speculative and of the practical kind. At present, let us consider who are capable and who are not capable of committing crimes. The general rule is, that all are capable of committing them. This general rule will be best illustrated and proved by ascertaining its exceptions. We have seen already, that the common law measures crimes chiefly by the intention. The intention necessarily supposes the joint operations of the understanding and the will.

If the operation of either is wanting, no crime can exist. In ideots, at all times; in lunaticks, except during their lucid intervals; and in infants, till they arrive at the age of discretion, the operation of the understanding is wanting. In ministerial officers, in wives, in persons under duress, the operation of the will is frequently presumed, by the law, to be wanting. In all such cases, the law imputes not criminality of intention.

On this subject, I cannot now enter into a detail: suffice it to have mentioned the general principles, according to which the particular cases are classed and determined.

In the commission of the same crime, the law often distinguishes different degrees of guilt. One may be a principal or an accessory: a principal may be so in the first or in the second degree: an accessory may be so before or after the fact. In some crimes, there are no accessories; in others, there are none before the fact.

The part acted by a principal is coexistent with the commission of the crime: the part acted by an accessory is antecedent or subsequent to it.

A principal in the first degree, is he who personally perpetrates the crime: a principal in the second degree, is he who is present, aiding and abetting it.[a]

An accessory before the fact is he who, though absent when the crime was committed, yet procured, counselled, commanded, or abetted the commission of it:[b]

[a] 1. Hale. P. C. 615. [b] Id. ibid.

an accessory after the fact is he who, knowing a crime to be committed, receives, relieves, comforts, or assists the criminal.[c]

In treason, there are no accessories either before or after the fact; for all consenters, aiders, abettors, and knowing receivers and comforters of traitors, are themselves principals. As to the course of proceeding, however, those who actually committed the treasonable fact, should be tried before those who consented or aided: for, in a contrary course of proceeding, this inconvenience might follow, that those who, in other crimes, would be principals in the second degree, might be convicted, and afterwards those who, in other crimes, would be principals in the first degree, might be acquitted. This most evidently would be absurd.

In trespass, and in crimes not felonious, all those who, in felonious crimes, would be accessories before the fact, are deemed principals; and those who, in felonious crimes, would be accessories after the fact, are not considered as having committed any offence.[e]

The distinction between accessories after and accessories before the fact, and between accessories and principals, ought to be carefully and accurately preserved: for in many cases, there is a real difference between the degrees of guilt, and a proportioned difference ought to be established, where it is not already established, between the degrees of punishment.

The distinction between principals in the first and those in the second degree, though preserved in theory,

[c] 1. Hale, P. C. 618. [d] Id. 618. [e] Id. ibid.

and sometimes in the course of proceedings on the trial, is, nevertheless, lost universally in the scale of punishments. He who watches, at a distance, to prevent a surprise, which might defeat the execution of a concerted plan, is punished equally with him, who, in the execution of it, uses the assassinating poignard, not necessary, not generally intended, but deemed solely by him who uses it as, in some measure, contributing to the principal and the concerted purpose. In such an immense disparity of guilt, there ought to be a disparity of punishment.

These reflections receive support from considerations of utility, as well as from those of intrinsick justice. When, a number confederate in a common enterprise, whose supposed advantages are to be equally participated, it is their effort to share only an equal proportion of the danger, as they are to receive only an equal proportion of the gain. This effort, instead of being countenanced by measuring the same punishment to all who act any part in the concerted enterprise, should be counterworked by graduating the punishment according to the part which each has acted. If the principal, who personally perpetrates the crime—for there is generally a capital part to be acted by some one—is distinguished, in punishment, from those who are only present, aiding and abetting the common adventure; this will increase the difficulty of finding one, who will act this capital and conspicuous part; as his danger will become greater in proportion to the greater severity of his punishment.

Besides; where there is society in danger, there is society in exertion; for even in criminal enterprises the social nature is not lost. Let one be selected, solitary, to perpetrate a crime and to suffer a punishment, in the

pain and guilt of which none are to be involved but himself; he will no longer be buoyed up on a fluid surrounding him at an equal level; and as it sinks down from him, he will sink down to it. Among associates in crimes, the law should sow the seeds of dissension.

Misprision consists in the concealment of a crime, which ought to be revealed.[f]

By a law of the United States, misprision of treason is punished with a fine not exceeding a thousand dollars, and imprisonment not exceeding seven years;[g] and misprision of felony, with imprisonment not exceeding three years, and a fine not exceeding five hundred dollars.

The receiving of goods, known to be stolen, is a high misdemeanor at the common law. By a law of the United States, it is punished in the same manner as larceny.[i]

Theft-bote, or the receiving again of one's goods which have been stolen, or other amends, upon an agreement not to prosecute, was formerly held to render one an accessory to the larceny: it is now punished only with fine and imprisonment. But merely to receive the goods again is no offence, unless some favour be shown to the thief.[j]

On the subject, concerning principals and accessories, as well as on the former, concerning the incapacity of guilt, I cannot now enter into a detail: suffice it here, as it sufficed there, to mention the general principles which will govern and illustrate the particular instances.

[f] 3. Ins. 36. 4. Bl. Com. 119. [g] Laws U. S. 1. con. 2. sess. c. 9. s. 2.

[h] Id. s. 6. [i] Id. s. 17. [j] 1. Haw. 125.

## CHAPTER IX.

### OF THE DIRECT MEANS USED BY THE LAW TO PREVENT OFFENCES.

I SHOULD now, according to my general plan, "point out the different steps, prescribed by the law, for apprehending, detaining, trying, and punishing offenders." But it will be proper first to consider a short, though a very interesting, title of the criminal law—the direct means which it uses to prevent offences.

These are, security for the peace; security for the good behaviour; and the peaceful, but active and authoritative interposition of every citizen, much more of every publick officer of peace, to prevent the commission of threatened, or the completion of inchoate crimes.

1. Security for the peace consists in being bound, alone, or with one or more sureties, in an obligation for an ascertained sum, with a condition subjoined that the

obligation shall be void, if the party shall, during the time limited, keep the peace towards all the citizens, and particularly towards him, on whose application the security is taken. [a]

Whenever a person has just cause to fear that another will kill, or beat, or imprison him, or burn his house, or will procure others to do such mischief to his person or habitation; he may, against such person, demand security for the peace; and every justice of the peace is bound to grant it, when he is satisfied, upon oath, that the party demanding it is, and has just reason to be, under such fear; and that the security is not demanded from malice, nor for vexation. [b] Upon many occasions, a justice of the peace may officially take security for the peace, though no one demand it. He may take it of those who, in his presence, shall make an affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendants, to the terrour of the citizens. [c]

If the party to be bound is in the presence of the justice, and will not find such sureties as are required; he may be immediately committed for his disobedience, and until he find them: but if he is absent, he cannot be committed without a warrant to find sureties. This warrant should be under seal, and should mention on whose application, and for what cause, it is granted. [d]

The obligation or recognisance to keep the peace may be forfeited by any actual violence to the person of an-

[a] 1. Haw. 129. 4. Bl. Com. 249.

[b] 1. Haw. 127.

[c] Id. 126.

[d] Id. 128.

ther, whether done by the party himself, or by others through his procurement: it may be forfeited by any unlawful assembly to the terrour of the citizens; and even by words tending directly to a breach of the peace, as by challenging one to fight, or, in his presence, threatening to beat him. But it is not forfeited by words merely of heat and choler; nor by a bare trespass on the lands or goods of another, unaccompanied with violence to his person. [e]

2. Security for the good behaviour includes security for the peace and more; but they are of great affinity with each other; and both may be contained in the same recognisance. It is not easy, upon this subject, to find precise rules for the direction of the magistrate: much is left to his own discretion. It seems, however, that he may be justified in demanding this security from those, whose characters he shall have just reason to suspect as scandalous, quarrelsome, or dangerous.

It has been said, that whatever is a good cause for binding a man to his good behaviour, will be a good cause likewise to forfeit his recognisance for it. But this rule is too large. One is bound, to prevent what may never happen: he is bound for giving cause of alarm; not for having done any mischief. His recognisance, however, may certainly be broken by the commission of any actual misbehaviour, for the prevention of which it was taken. [f]

3. I have mentioned the peaceful, but active and authoritative interposition of every citizen, much more of every publick officer of the peace, as a means for prevent-

[e] 1. Haw. 130. 131. [f] Id. 129. 131.

ing the commission of threatened, and the completion of inchoate crimes. This subject has not received the attention, which it undoubtedly merits; nor has it been viewed in that striking light, in which it ought to be considered.

In every citizen, much more in every publick officer of peace and justice, the whole authority of the law is vested—to every citizen, much more to every publick officer of peace and justice, the whole protection of the law is extended, for the all-important purpose of preventing crimes. From every citizen, much more from every publick officer of peace and justice, the law demands the performance of that duty, in performing which they are clothed with legal authority, and shielded by legal protection.

The preservation of the peace and the security of society has, in every stage of it, been an object peculiarly favoured by the common law. To accomplish this object, we can trace, through the different periods of society, regulations suited to its different degrees of simplicity, or of rudeness, or of refinement.

The much famed law of decennaries, by which, in small districts, all were reciprocally bound for the good behaviour of all, was well adapted to the age of the great Alfred, when commerce was little known, and the habits and rules of enlarged society were not introduced.

In times more turbulent, precautions for the security of the citizens were taken, more fitted to those turbulent times. The statute of Winchester, made in the thirteenth year of the reign of Edward the first, contains many regulations upon this subject; but they were regulations

for enforcing the "ancient police" of the kingdom;[g] and their design is expressly declared to have been, to prevent the increase of crimes; or, in the language of that day, "to abate the power of felons."

For the purposes of prevention, it was directed, that, in great walled towns, the gates should be shut from the setting to the rising of the sun: that, during that time, watches, as had been *formerly* used, should, in proportion to the number of inhabitants, watch continually: that if any stranger passed by, these watches should arrest and detain him till the morning: and that if any one resisted the arrest, hue and cry should be raised; and those, who kept watch, should follow the hue and cry from town to town, till the offender was taken. Every week, or at least every fifteenth day, the bailiffs of towns were obliged to make inquiry concerning all who lodged in the suburbs; and if they found any who lodged or received persons, of whom it was suspected that they were "persons against the peace," they were to do what was right in the matter.[h]

The hue and cry was an institution of the common law: the Mirrour, speaking of the ancient laws before the conquest, makes express mention of pursuit from town to town at the hue and cry. The passage is very remarkable, and deserves, on many accounts, to be transcribed at large. It is a part of that section which has for its title—"the first constitutions ordained by the ancient kings, from King Alfred." Among others are introduced the following articles—"Every one of the age of fourteen years and upwards shall be ready to kill capital offenders

[g] 1. Reev. 442. [h] St. 13. Ed. 1. c. 4.

in their notorious crimes, or to pursue them from town to town at hue and cry." "If they can neither kill nor apprehend them, they shall take care to have them put in the exigent, in order that they may outlaw or banish them in the following manner," &c. [i]

If a man, who is under a recognisance to keep the peace, beat or fight with one who attempts to kill *any* stranger; it is not a forfeiture of his recognisance. [j]

If, as we have seen upon a former occasion, [k] a person who interposes to part the combatants in a sudden affray, and gives notice to them of his friendly intention, be assaulted by them or either of them, and, in the struggle, should happen to kill; this will be justifiable homicide. On the other hand, if this person be killed by the combatants, or either of them, it will be murder. To preserve the publick peace, and to prevent mischief, it is the duty of every man, in such cases, to interpose. [l]

When the law enjoins a duty, it both protects and authorizes the discharge of it. Ministers of justice, it will be admitted on all hands, are, while in the execution of their offices, under the peculiar protection of the law. Without such protection, the publick peace and tranquillity could not, by any means, be preserved. But this peculiar protection of the law is not confined personally to one, who is a minister of justice: it is extended to all those who come in aid of him, and afford their assistance for the preservation of the peace. Even all those who *attend* for that purpose are under the same protection. It

[i] 4. Cou. Ang. Norm. 487.

[j] 1. Haw. 131.

[k] Ante. p. 85. 86.

[l] Fost. 272.

is immaterial whether they were or were not commanded to render their service upon the occasion. This peculiar protection of the law extends still farther. It reaches to private persons who, though no minister of justice be present, interpose for preventing mischief in the case of an affray. They are in the discharge of a duty which the law requires. The law is their warrant; and they may justly be considered as persons employed in the publick service, and in the advancement of justice. [m]

If so, in the case of an affray, in which, on each side, the same disposition is shown; much more so, in a case of premeditated, concerted, planned, prepared, riotous, felonious, and treasonable outrage, on one side—connived at, perhaps countenanced, by those in the administration of the government. In such a case, the legal duty, the legal authority, and the legal protection operate with tenfold energy and force. In such a case, the law may well be said to throw herself, without reserve, upon the arms of the citizens. In such cases, the citizens, with open arms, are bound to receive her, and to give her that protection, which, in return, she confers upon them.

The application of this important principle of preventive justice is admirably fitted to small, as well as to the greatest occasions. If it was strictly made upon all occasions, the benefits redounding to society would be immense. The petulant ill nature of the boy, the quarrelsome temper of the man, the rapacious aim of the robber, and the malignant disposition of the assassin, would be immediately checked in their operations. The principles

[m] Fost. 309.

themselves, unsupplied with fuel to inflame them, would, at last, be extinguished.

Thus much for the means, which the law employs directly for the benevolent purpose of preventing crimes.

# CHAPTER X.

## OF THE DIFFERENT STEPS PRESCRIBED BY THE LAW, FOR APPREHENDING, DETAINING, TRYING, AND PUNISHING OFFENDERS.

I NOW proceed to the different steps which the law prescribes for apprehending, detaining, trying, and punishing criminals.

A warrant is the first step usually taken for their apprehension.

A warrant is a precept from a judicial to a ministerial officer of justice, commanding him to bring the person mentioned in it, before him who issues it, or before some other officer having judicial authority in the cause.[a] This warrant should be under the hand and seal of the magistrate issuing it: it should mention the time and place of making it, and the cause for which it is granted. It

[a] Wood. Ins. 81. 1. Bl. Com. 137. 4. Bl. Com. 287.

may be either to bring the party generally before any magistrate, or specially to bring him before the magistrate only who grants it. It may be directed to the sheriff, constable, or to a private person; for the warrant constitutes him, for this purpose, an authorized officer.[b]

By the constitution of Pennsylvania,[c] no warrant to seize persons shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. Such warrant may be granted, even by any justice of the peace, for treason, felony, or any other offence against the peace.[d]

When the warrant is received by the person to whom it is directed, he is authorized, and, if a publick officer, obliged to execute it, so far as the jurisdiction of the magistrate and himself extends.[e] A sheriff may depute others; but every other person is obliged himself to execute it; though others may lawfully assist him. A warrant directed to all constables generally can be executed by each only in his own precinct: but a warrant directed to a particular constable by name, may be executed by him any where within the jurisdiction of the magistrate.[f]

The execution of the warrant is commenced by an arrest; which is the apprehending or restraining of the person, whom it mentions or describes.[g] But, besides those arrests which are made in the execution of warrants, there are others enjoined or justified by the law.

[b] 2. Haw. 85. [c] Art. 9. s. 8. [d] 2. Haw. 84.

[e] 4. Bl. Com. 288. [f] 2. Haw. 86. [g] 4. Bl. Com. 286.

All, of age, who are present when a felony is committed, or when a dangerous wound is given, are, on pain of fine and imprisonment, bound to apprehend the person who has done the mischief.[h] If the crime has been committed out of their view, they are, upon a hue and cry, obliged to pursue with the utmost diligence, and endeavour to apprehend him who has committed it. Hue and cry is the pursuit of an offender from place to place, till he is taken: all who are present when he commits the crime, are bound to raise it against him on his flying for it. Every one is obliged to assist an officer demanding his assistance, in order to apprehend a felon, to suppress an affray, or to secure the persons of affrayers.[i] In all these cases, the doors of houses may, if necessary, be broken open for the apprehension of the offenders, if admittance is refused on signifying the cause of demanding it.[j]

It is a general rule, that, at any time, and in any place, every private person is justified in arresting a traitor or a felon; and, if a treason or a felony has been committed, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.[k] If one see another upon the point of committing a treason or a felony, or doing any act which would manifestly endanger the life of another; he may lay hold on him, and detain him till it may be presumed reasonably that he has altered his design.[l] In the case of a mere breach of the peace, no private person can arrest one for it after it is over.[m]

[h] 2. Haw. 74. [i] Id. 75. [j] Id. 86. 4. Bl. Com. 289.

[k] 2. Haw. 76. [l] Id. 77. [m] Id. ibid.

Whenever an arrest may be justified by a private person, it may *a fortiori* be justified by an officer of justice.[n] In addition to their own personal exertions, they have a right to demand the assistance of others.[o] A constable may not only arrest affrayers, but may also detain them till they find security for the peace.[p] A justice of the peace may, by parol, authorize any one to arrest another, who, in his presence, is guilty of an actual breach of the peace, or, in his absence, is engaged in a riot.[q]

Whenever a person is arrested for a crime, he ought to be brought before a justice of the peace, or other judicial magistrate. This magistrate is obliged immediately to examine into the circumstances of the crime alleged; and according to the result of this examination, the person accused should be either discharged, or bailed, or committed to prison.

If it clearly appear that no crime was committed, or, if committed, that the suspicion conceived against the prisoner is entirely unfounded; he should be restored to his liberty.[r]

To bail a person is to deliver him to his sureties, who give sufficient security for his appearance: he is intrusted to their friendly custody, instead of being committed to the confinement of the gaol. At the common law, every man accused or even indicted of treason or of any felony whatever, might be bailed upon good surety: for at the common law, says my Lord Coke,[s] the gaol was

[n] 2. Haw. 80. [o] Id. 81. [p] Id. ibid.

[q] Id. 83. [r] Id. 87. [s] 2. Ins. 189.

his pledge, who could find no other: he could be bailed, till he was convicted.

This part of the common law, however, is, in England, greatly altered by parliamentary provisions, which restrict, in numerous instances, the power of admitting to bail. Indeed it is obvious, that between the law of capital punishments and that of commitments, the connexion must be intimate and inseparable. In capital offences, no bail can be a security equal to the actual custody of the person: for what is there, which a man may not be induced to forfeit to save his life? [t] One court in England, and only one—the court of king's bench, or, in the time of the vacation, any judge of that court—still possesses the discretionary power of bailing in any case, according to its circumstances; excepting only such persons as are committed by either house of parliament, while the session lasts, and such as are committed for contempts by any of the superiour courts of justice. [u]

To refuse or to delay bail, where it ought to be granted, is a misdemeanor at the common law, [v] and may be punished on an indictment. By the constitution of Pennsylvania, [w] it is declared, as an inviolable rule, "that excessive bail shall not be required;" and "that all prisoners shall be bailable by sufficient sureties; unless for capital offences, when the proof is evident or presumption great."

If the crime is not bailable, or if the prisoner cannot find sureties, the magistrate is under the disagreea-

[t] 4. Bl. Com. 294.

[u] Id. 296.

[v] 2. Haw. 90.

[w] Art. 9. s. 13, 14.

ble necessity of ordering, by a warrant under his hand and seal and containing the cause of the order, that he shall be imprisoned in the publick gaol, till he be thence delivered by the due course of law.[x] This is a commitment.

This imprisonment, it ought to be remembered, is for the purpose only of keeping, not for that of punishing the prisoner: he ought, for this reason, to be treated with every degree of tenderness, of which his safe custody will possibly admit. In particular, a gaoler is not justified, by the law, in fettering a prisoner, unless where he is unruly, or where it is absolutely necessary to prevent an escape.[y] "Solent præsides in carcere continendos damnare ut in vinculis contineantur; sed hujusmodi interdicta sunt a lege, quia carcer ad continendos, et non puniendos, haberi debeat."[z] "Custodes vero gaolarum pœnam sibi commissis non augeant, nec eos torqueant; sed, omni sævitia remota, pietateque adhibita, judicia in ipsos promulgata debite exequantur."[a] Such is the law of imprisonment, ancient and approved.

When the party is taken, and bailed or imprisoned; the next step in order is, to institute a prosecution against him. This may be done by four different methods—by appeal; by information; by presentment; by indictment.

1. An appeal is an accusation by one private person against another for some crime: it is a private action of

[x] 4. Bl. Com. 297.

[y] 3. Ins. 34.

[z] Bract. 105. a.

[a] Fleta. l. 1. c. 26.

the party injured, demanding punishment for the injury which he has suffered: it is also a prosecution for the state, on account of the crime committed against the publick.[b]

In ancient times there were appeals for a breach of the peace, for a battery, and for false imprisonment, as well as for more aggravated injuries and crimes; but they have been out of use, and converted into actions of trespass, for many hundred years.[c]

An appeal lies for mayhem, for larceny, for arson, for rape, for death. It is brought by the party ravished, robbed, maimed, or whose house was burned; or by the wife, or, if no wife, by the heir, of the person killed.[d] An appeal may be brought previous to an indictment; and if the defendant be acquitted, he cannot afterwards be indicted for the same crime: if he is found guilty, he shall suffer the same punishment as if he had been convicted on a prosecution by an indictment.[e] An appeal may be discharged by the concurrence of all the parties interested—by the pardon of the crown, and by the release of the appellant.[f]

The appeal can be traced to the ancient forests of Germany. "Luitur homicidium," says Tacitus,[g] "certo armentorum ac pecorum numero; recipitque satisfactionem universa domus."

[b] 4. Bl. Com. 308. 2. Haw. 155. [c] 2, Haw. 157.

[d] 2. Haw. 164. 4. Bl. Com. 310. [e] 4. Bl. Com. 311.

[f] 1. Hale. P. C. 9. [g] De mor. Ger. c. 21.

On this subject there is, in our law books, an immense profusion of professional learning. As the appeal is now but little used, I decline any minute inquiry concerning it: as it is still in force, it would have been improper wholly to have omitted it.

2. A second mode of prosecuting crimes and offences is by information. Some informations are brought partly at the suit of the state, and partly at the suit of a citizen. These are a species of *qui tam* [h] actions; and will be considered when we treat concerning civil suits.

Informations in the name of the state or of the crown alone are of two kinds: those which are filed *ex officio* by the publick prosecutor, and are properly at the suit of the publick; and those which are carried on in the name, indeed, of the commonwealth or crown, but, in fact, at the instance of some private person or common informer. The first have been the source of much; the second have been the source of intolerable vexation: both were the ready tools, by using which Empson and Dudley, and an arbitrary star chamber, fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes: but ingenious tyranny can torture in a thousand shapes, without depriving the person tortured of his life.

Restraints have, in England, been imposed upon the last species: but the first—those at the king's own suit, filed by his attorney general—are still unrestrained.[i] By the constitution of Pennsylvania, both kinds are effec-

[h] 4. Bl. Com. 303. [i] Id. 307.

tually removed. By that constitution, however, informations are still suffered to live: but they are bound and gagged. They are confined to official misdemeanors; and even against those, they cannot be slipt but by leave of the court. By that constitution, "no person shall, for any indictable offence, be proceeded against criminally by information"—"unless by leave of the court, for oppression and misdemeanor in office." Military cases are also excepted.

3. Presentment is a third species of prosecution. A presentment, in its most extensive signification, comprehends inquisitions of office, of which the coroner's inquest is one: it comprehends likewise regular indictments, which are preferred and found. But, in its proper sense, it is an accusation found by a grand jury, of their own motion, and from their own knowledge and observation, without any bill being laid before them by the prosecutor for the publick. This presentment is afterwards reduced into proper form by the publick prosecutor; and in this form is sent to the grand jury, in the same manner as bills which are originally preferred to them by that officer. These bills and this presentment, found in form, are indictments.

When the grand jury, after having heard the evidence adduced to support a bill, think it insufficient for this purpose, they endorse on the bill "ignoramus," and direct the foreman to sign this endorsement. By this endorsement it is meant, that though the matters charged in the bill may be true, their truth is not sufficiently evinced to the jury. If the charge in the bill appears to be supported, it is

[j] Art. 9. s. 10.

then endorsed "a true bill," and as such is signed by the foreman.

A grand jury must consist of at least twelve members, because twelve are necessary—it must not consist of more than twenty three members, because twelve are sufficient, to find an indictment; and twelve would not be a majority of a greater number.

At the common law, a grand jury cannot find an indictment for any crime, but such as has been committed within the county or precinct, for which they are returned. [k]

A bill cannot be returned true in part, and false in part; it must be returned "a true bill" or "ignoramus" for the whole. Nor can it be returned specially or conditionally. [l]

Much might be said concerning the form of indictments generally, and also concerning the particular form of the indictment for each particular species of crimes: but this kind of learning, which, by the by, ought neither to be overlooked nor disregarded by the professional lawyer, is found in full and minute detail in the numerous books and treatises of the criminal law. To these I beg leave to refer you. To go fully into particulars would employ too great a proportion of my lectures: to go imperfectly would convey no information that could be deemed regular or satisfactory.

Suffice it to observe, as a general and important principle with regard to indictments, that as to persons, times,

[k] 2. Haw. 220. [l] Id. 210.

and places, and, above all, as to the descriptions of crimes, the most precise certainty which can be reasonably expected is indispensably required. Certainty, indeed, is a governing and a pervading quality in all good legislation, and in all good administration of law. In this very important quality, the common law, pure and unadulterated, has attained a very uncommon degree of perfection. I add, that the common law is equally remarkable for the simplicity as for the accuracy of its forms. I repeat it—they deserve the close study and attention of every lawyer by profession. Even to others, who have leisure and a taste to inspect minute as well as splendid beauties, the forms of the common law will afford entertainment and instruction.

The principles of the great institution of grand juries have been explained fully in another place.

When a person is indicted, and is not already committed or under bail, the next step in the legal arrangement is, to issue process against him, in order that he may be obliged to answer the charge, of which he stands indicted.

On an indictment for any crime under the degree of treason or felony, the process proper to be first awarded, at the common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party.[m] If this process is not obeyed, and it is seen by the return that he has lands in the county by which he may be distrained; then a distress shall be awarded against him, from time to time, till he appear. But if the return shows that he has no lands

[m] 2. Haw. 283.

in the county; then a writ of *capias* is awarded against him. By this writ, as is intimated from its name, the sheriff is commanded to take the body of the person accused, and have him before the court at the time and place specified in the writ itself. If he cannot be taken on the first capias, a second, and so on, shall be issued.[n] On an indictment for felony or treason, a capias is always the first process.[o]

We are told that, in the case of misdemeanors in England, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of capias immediately against the defendant.[p]

If the party abscond, and cannot be taken; then, after the several writs have been issued against him in regular number according to the nature of the crime with which he is charged, he is, at five county courts, proclaimed and required to surrender himself; and if he does not appear at the fifth requisition, he is then adjudged to be outlawed —put out of the protection of the law.[q]

When one is outlawed on an indictment for a misdemeanor, he forfeits his goods and chattels. In felony or treason, outlawry is a conviction and an attainder of the crime charged in the indictment.[r] Any one may arrest an outlaw for those crimes, in order to bring him to execution. He was formerly said "gerere caput lupinum," and might be knocked on the head like a wolf, by every

[n] 2. Haw. 283. [o] Id. 284. [p] 4. Bl. Com. 314.

[q] 4. Bl. Com. 314. [r] Id. ibid. 2. Hale. P. C. 205.

one who met him. But the law is now very justly holden to be otherwise. As to the security of his person, the greatest and the most notorious criminal is still under the protection, though liable to the punishment, of the law. It is lawful, as has been said, to apprehend him, in order to bring him to legal punishment. But to kill him wantonly, wilfully, or deliberately, merely because he is an outlaw, is murder.[a]

The proceedings necessary to an outlawry are uncommonly circumstantial, and must be exact to the minutest degree. Indeed, it is proper that they should be so. The consequence is, that an outlawry may, in most instances, be reversed on a writ of errour. When this is done, the person indicted is admitted to his defence against the indictment.

When a person indicted comes or is brought before the proper court, he is arraigned; in other words, he is called upon by his name, the indictment is read to him, and he is asked what he has to say in answer to the indictment.

At this important crisis of his fate, when his life may depend upon a word, and when, for this reason, every word should, as far as possible, be the result of perfect recollection and freedom, he must not be loaded with fetters or chains; he must not be brought to the bar in a contumelious manner; he ought to be used with all the humanity and gentleness consistent with the situation, in which he unfortunately stands; and he should suffer no uneasiness, except that which proceeds from internal

[a] 1. Hale. P. C. 497.

causes.[t] The judge should exhort him to answer without fear; and should give him assurance that justice shall be duly administered.[u] "Cum captus coram justiciariis producendus fuerit, produci non debet ligatis manibus (quamvis aliquando compedibus propter periculum evasionis) et hoc ideo, ne videatur coactus ad aliquam purgationem suscipiendam".[v]

Is it necessary to fortify, by authority, the law of humanity? Sometimes it is. Sometimes the law of humanity, even when fortified by authority, has been pleaded in vain. The cruel violation, as well as the benign observance, of the principles of goodness and law ought to be known and marked. The last should be approved and imitated: the first should be detested and avoided. In the present enlightened century—and humanity should surely attend knowledge—a chief justice of the court of king's bench suffered a person in irons to be arraigned for treason before him, though he was informed, that they were so grievous as to prevent the prisoner's sleeping except in a single posture, and that even while he was before the court, he would be unable to stand, unless the gaoler—for the gaoler had more bowels than the judge—unless the gaoler assisted him to hold up his chains.[w]

It is usual to desire the prisoner to hold up his hand when he is arraigned. This formality is not improper, because it serves to identify the person: it is not necessary, because the person may be identified in another manner. My Lord Bacon mentions a Welshman, who put a curious construction on this ceremony. Having

[t] 2. Haw. 308.

[u] 2. Ins. 316.

[v] Bract. 137. a.

[w] 6. St. Tri. 231.

been at a court, where he saw the prisoners hold up their hands at the bar as they severally received their sentences, he told one of his acquaintances that the judge was an excellent fortune teller; for if he only looked upon the hand of a person, he could immediately declare what would be his fate.

A person, upon being arraigned, must stand mute, or give an answer.

One is considered as standing mute, when he gives no answer at all; when he gives such an answer as cannot be received; and when he pleads not guilty, but, on being asked how he will be tried, either refuses to say any thing, or will not put himself upon the country.[y]

On standing mute, the judgment was indeed a terrible one—"that he be sent to the prison from whence he came, and put into a dark lower room, and there be laid naked upon the bare ground, upon his back, without any clothes or rushes under him, or to cover him, his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron as he can bear, and more. The first day he shall have three morsels of barley bread without drink; the next day he shall have three draughts of standing water next the door of the prison, without bread; and this to be his diet till he die."[z] To the execution even of this terrible judgment some have submitted, that from forfeiture their estates might be rescued for the benefit

[x] 3. Ld. Bac. 270. [y] 2. Hale. P. C. 316. [z] Id. 319.

of their children; for by standing mute, forfeiture and the corruption of blood are prevented.

The origin of the *peine fort et dure* it is exceedingly difficult to trace: it seems, however, to be no legitimate offspring of the ancient common law: by that law, the standing mute amounted to a confession of the charge.[a]

By the law of Scotland, if the pannel stands mute and will not plead, the trial shall proceed as usual; and it is left to him to manage his own defence, as he shall think proper.[b] The spirit of this law is adopted by the legislature of the United States.[c] "If a person indicted shall stand mute, the court shall proceed to his trial, as if he had pleaded not guilty, and shall render judgment accordingly."[d]

To an indictment, the prisoner may give an answer, or plead, as the law terms it, in a great variety of ways.

I. He may admit the facts, as stated in the indictment, to be true; but, at the same time, may deny that the facts, thus stated and admitted, amount in law to the crime charged in the indictment. This is a demurrer. Thus, if one is indicted for larceny committed by stealing apples growing on a tree, he may demur to this indictment; in other words, he may admit that he took the apples from the tree, but deny that the fact of taking

[a] 4. Bl. Com. 323. [b] Bar. on St. 87.

[c] Laws U. S. 1. con. 2. sess. c. 9. s. 30.

[d] A similar provision is contained in an act of assembly of Pennsylvania. 3. Laws Penn. 119. *Ed.*

them amounts in law to the crime of larceny; because apples, unsevered from the tree, are not personal goods; and because of personal goods only larceny can be committed. This demurrer brings regularly before the court the legal question, whether the facts stated constitute the crime charged in the indictment. When the prosecutor joins in this demurrer—when he avers that the facts stated constitute the crime charged; then an issue is said to be joined. An issue is the result of the pleadings in a single point, denied on one side and affirmed on the other. It is either an issue in law, such as has now been mentioned; or it is an issue in fact, such as will be mentioned hereafter.

It seems to be taken for granted, by many respectable writers on the criminal law, that if, on a demurrer to an indictment, the point of law is determined against the prisoner, he shall have the same judgment pronounced against him as if he had been convicted by a verdict. With regard to crimes not capital this seems to be the case: but with regard to capital crimes, no adjudication is produced in support of the opinion. My Lord Hale indeed says, in one place of his valuable history of the pleas of the crown, that if a person be indicted of felony, and demur to the indictment, and it be judged against him, he shall have judgment to be hanged; for it is a confession, and, indeed, a wilful confession of the indictment.[c] In another place, however, he takes a distinction between this kind of confession, which, though voluntary, is still extrajudicial, and that full and solemn confession, which will by and by be mentioned. An ex-

[c] 2. Hale. P. C. 257.

trajudicial confession, says he, though it be in court, as where the prisoner freely discloses the fact, and demands the opinion of the court whether it be felony, will not be recorded by the court, even if, upon the fact thus disclosed, it appear to be felony; but he will still be admitted to plead *not guilty* to the indictment.[f] There seems to be a solid reason for this distinction: for though a demurrer admits the truth of the facts as stated in the indictment, yet it cannot be considered as an explicit and solemn confession of what is more material—the criminal and felonious intention, with which the facts were done. This criminal and felonious intention is the very point or *gist*, as the law calls it, of the indictment; and should be answered explicitly and directly.

II. This answer may be given by a solemn and judicial confession, not only of the fact, but of the *crime*—in the language of the law, it may be done by pleading *guilty*.

Upon this subject of confession on the part of the criminal, three very interesting questions arise with respect to capital crimes: for of those only I now speak. 1. Is a confession necessary? 2. Ought it to be made? 3. Ought it to be received as a sufficient foundation for a conviction, and judgment against life?

1. In many countries, his confession is considered as absolutely indispensable to the condemnation of the criminal. The Marquis of Beccaria conjectures that this rule has been taken from the mysterious tribunal of penitence, in which the confession of sins is a necessary part

[f] 2. Hale. P. C. 225.

of the sacrament: thus, says he, have men abused the unerring light of revelation.[g] This confession they endeavour to obtain by the oath, and by the torture, of the person accused. He is obliged to answer interrogatories. These interrogatories—we are told; for of experience on this subject we are happily ignorant—these interrogatories are reduced to a system, captious, uncandid, and ensnaring; and terrour is frequently added to fraud.[h] The practice of demanding the oath of the accused is said, by the famous President de Lamoignon, to have derived its origin from the customs of the inquisition.[i]

Very opposite, upon this subject, is the genius of the Gentoo code. In that very ancient body of law, we find it expressly declared, that wherever a true testimony would deprive a man of his life; if a false testimony would be the preservation of it, such false testimony is lawful.[j]

Between those extremes the constitution of Pennsylvania[k] observes the temperate mean. "In prosecutions by indictment or information, a man cannot be compelled to give evidence against himself." This is likewise an immemorial and an established principle of the common law.

In the case of oaths, says Beccaria, which are administered to a criminal to make him speak the truth, when the contrary is his greatest interest, there is a palpable contradiction between the laws and the natural sentiments

[g] Bec. c. 16. [h] 5. War. Bib. 321. [i] 8. War. Bib. 195.

[j] Gent. Laws. 115. [k] Art. 9. s. 9.

of mankind. Can a man think himself obliged to contribute to his own destruction? Why should he be reduced to the terrible alternative of doing this, or of offending against God? For the law, which, in such a case, requires an oath, leaves him only the choice of being a bad christian, or of being a martyr. Such laws, continues he, are useless as well as unnatural: they are like a dike opposed directly to the course of the torrent: it is either immediately overwhelmed, or, by a whirlpool which itself forms, it is gradually undermined and destroyed.[l]

If it is useless, unjust, and unnatural, to attempt the extracting of truth by means of the oath; what is it, to make this attempt by means of the torture? This, like the former, is happily unknown to the common law. This, like the former, can be traced to the merciless tribunals of the inquisition. This, like the former, has been a practice both general and destructive.

To the civil law, its origin has been frequently ascribed. My Lord Coke, in his third Institute, declares himself explicitly of this opinion. He says, that in the reign of Henry the sixth, the Duke of Exeter and the Duke of Suffolk intended to have brought the civil laws into England; and, for a beginning, first brought into the tower the rack or brake allowed in many cases by the civil law.[m] To systems, as well as to men, justice should be done. From the imputation of a sanguinary as well as of a tyrannical spirit, the Roman law, at least in its brighter ages, deserves to be rescued. The different periods in the history of that celebrated law should be

[l] Bec. c. 18. [m] 3. Ins. 35.

carefully distinguished; and the redness or the blackness of one era ought not to shade or stain the purity and the splendour of another.

In the times of the republick, torture was known at Rome; and this, it must be owned, was too much to be known any where. It was confined, however, to the slaves. The whole torrent of Cicero's eloquence was poured indignant upon the infamous Verres, because he had the audacity as well as cruelty to torture a Roman citizen, with his eyes turned towards Rome. "Cædebatur virgis in medio foro Messanæ civis Romanus, judices; cum interea nullus gemitus, nulla vox alia istius miseri, inter dolorem crepitumque plagarum, audebatur, nisi hæc, civis Romanus sum."—"O nomen dulce libertatis! O jus eximium nostræ civitatis! O lex Porcia, legesque Semproniæ! O graviter desiderata, et aliquando reddita plebi Romanæ tribunicia potestas! Huccine tandem omnia reciderunt, ut civis Romanus, in provincia populi Romani, in oppido fœderatorum, ab eo qui beneficio populi Romani fasces et secures haberet, deligatus in foro virgis cæderetur? Quid, cum ignes ardentesque laminæ cæterique cruciatus admovebantur?"[n]—"Non fuit his omnibus iste contentus. Spectet, inquit, patriam: in conspectu legum libertatisque moriatur."[o]

In another place, the same exquisite judge of human nature and of law describes, in the most masterly manner, the futility of that kind of proof, which arose from the torture of slaves. "Quæstiones nobis servorum, ac tormenta accusator minitatur; in quibus quanquam nihil periculi suspicamur, tamen illa tormenta gubernat dolor,

[n] Cic. in Ver. V. 62. 63. [o] Id. 66.

moderatur natura cujusque tum animi tum corporis; regit quæsitor, flectit libido, corrumpit spes, infirmat metus, ut in tot rerum angustiis nihil veritati loci relinquatur." [p]

About three hundred years after Cicero, the celebrated Ulpian, characterized as "the friend of the laws and of the people," [q] speaks of torture in the same strain—"Res est fragilis et periculosa, et quæ veritatem fallat. Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tanta sunt impatientia, ut in quovis mentiri, quam pati tormenta velint. Ita fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios comminentur." [r]

The early christians also bore their testimony against the cruel and absurd practice. "Cum quæritur," says St. Augustine, "utrum vir sit nocens, cruciatur; et innocens fuit pro incerto scelere certissimas pœnas; non quia illud commisisse detegitur, sed quia non commisisse nescitur; ignorantia judicis calamitas innocentis"—"judex torquit accusatum, ne occidat, nesciens, innocentem; tortum et innocentem occidit, quem, ne innocentem occiderit, torserat." [s]

Among the moderns, says a sensible French writer, the practice of torture has been adopted and carried to the last degree of atrocity, in those countries in which human nature has been most debased and most oppressed —I mean those of the inquisition: on the contrary, it has been abolished or moderated in those, in which the human

[p] Cic. pro. P. Syl. c. 28.

[q] 1. Gib. 249.

2. War. Bib. 23.

[r] Id. 22.

mind has reassumed her liberty—in Geneva, in England, in France under Lewis the sixteenth. [t]

From what has been observed, the inference is clear, that the confession of the criminal is not necessary to a conviction or sentence in the case of a capital crime.

2. In the case of a capital crime, ought this confession to be made?

I think not. When I say this, I speak with a reference to the effect, which this confession is allowed to have by the common law. I am justified by authority in what I say. From tenderness to life, the court is usually very averse to the receiving and recording of such a confession; and will advise the prisoner to retract it, and plead another plea to the indictment. [u] If a person under the age of twenty one years make this confession, the court in justice ought not to record it, but should put him to plead *not guilty;* or, at least, ought to inquire by an inquest of office concerning the truth and circumstances of the fact. [v] A confession, refused altogether, or received with reluctance, ought not to be made.

3. Ought this confession to be received, and considered as a sufficient foundation for a conviction and judgment against life?

By the common law, as it now is and as it always has been received, such a confession is deemed a sufficient

[t] 8. War. Bib. 197. [u] 2. Hale. P. C. 225. 4. Bl. Com. 324.

[v] 1. Hale. P. C. 24.

foundation for a conviction and judgment against life. This express, judicial, and direct confession is considered as the highest possible conviction;[w] and after it is made and received, the court does and can do nothing but pronounce the judgment of the law.[x]

It now, I apprehend, appears from principle, as it appeared a little while ago from authority, that, on an indictment for a capital crime, this express, judicial, and direct confession of it ought not to be made. He who makes it undertakes to be the arbiter of his own life: for, as we now see, the judgment of death follows as a consequence, necessary and unavoidable. A decision of this very solemn kind ought to be a decision of the society, upon the principles formerly explained, and not a decision of the party himself. For such a decision he may be unqualified, sometimes on account of his understanding, sometimes on account of his disposition. He may not be apprized of every legal ingredient, which ought to form a part in the composition of the crime which he confesses: human conduct is sometimes influenced by an irresolute impatience, as well as, at other times, by an overweening fondness of life.

It is certainly true, that persons have confessed themselves guilty of crimes, of which, indeed, they were innocent. A remarkable case of this nature is mentioned in our law books. A gentleman of the name of Harrison appeared alive, many years after three persons had been hanged for his murder; one of whom confessed it.

[w] 2. Haw. 333. [x] 4. Bl. Com. 334.

[y] Tr. per Pais. 603.

Many persons accused have confessed themselves guilty of witchcraft, and of other crimes equally problematical.

By the civil law, the confession of the person accused is not sufficient to convict him of a capital crime, without other proofs: for it may so happen, that such a confession is dictated only by the inquietude or despair of a troubled mind.[z] Another reason may likewise be assigned: he may, by a mistaken as well as by a disordered understanding, acknowledge that to be a crime, which in law is not that crime.

Thus much for confession, or the plea of *guilty* to an indictment.

III. An indictment may be answered by a plea to the jurisdiction of the court, in which it is found. This plea is proper when an indictment for any particular crime is found in a court, which has no authority to hear, try, or determine that particular crime: as if a court of quarter sessions should arraign one on an indictment for treason, of which that court has no jurisdiction.[a]

IV. An indictment may be answered by a plea in abatement—in other words, a plea, the design of which is to destroy the indictment, without answering the crime which it charges. This, in some cases, may be very proper; as when one is indicted and called to answer by a wrong name. If he suffer this mistake to pass unnoticed, it is doubtful whether he may not afterwards be indicted for the same crime by his right name. If the plea be supported, the indictment will be abated; but he

[z] 1. Domat. 460. [a] 2. Hale. P. C. 256

may be immediately indicted anew, by the name which he has averred to be his true one. For in all pleas in abatement it is a rule, that he who would take advantage of a mistake, must show, at the same time, how that mistake may be rectified.

V. An indictment may be answered by a plea in bar. A plea in bar does not directly deny the commission of the crime charged; but it adduces and relies on some reason calculated to show, that the prisoner cannot be tried or punished for it, either on that or on any other indictment.

A former acquittal of the same charge is a plea of this kind: for it is a maxim firmly established by the common law, that no one can be brought in danger oftener than once on account of the same crime.

A former conviction of the same crime is also a plea of this kind; and depends on the same principle.

An attainder of any capital crime is a good plea in bar of an indictment for the same, or for any other crime. The reason is, that by the attainder the prisoner is dead in law; his blood is corrupted; and his estate is forfeited; so that an attempt to attaint him a second time would be altogether nugatory and superfluous.

It is natural and obvious to remark here, how the severity of punishment becomes the parent of impunity for crimes. When one is punished, or condemned to be punished, as far as he can be punished, for one crime, he may commit another, without any fear or risk of additional punishment.

In proportion as the criminal code becomes less severe, the operation of the plea of a former attainder becomes less powerful; for it is never proper, unless when a second trial could answer no purpose.

A pardon is another plea in bar of an indictment; for, by remitting the punishment of the crime, it destroys the end which is proposed by the prosecution. In England, an advantage is gained by pleading a pardon, which cannot be obtained by it after an attainder. A pardon prevents the corruption, but cannot restore the purity of blood.

If any one of these pleas in bar is successful, the party pleading it is discharged from farther prosecution; but if they should all fail, a resource is still left.

VI. An indictment may be answered by pleading *not guilty* of the crime which it charges. An issue, you recollect, is a point denied on one side and affirmed on the other. The plea of *not guilty* is called the general issue; because, on that plea, the whole charge comes regularly and fully under examination. It is averred by the indictment: it is denied by the plea. On this plea alone—such, as we have seen from the foregoing deduction, is the benignity of the common law—on this plea alone, the prisoner can receive a final judgment against him. A judgment of acquittal may be produced by many different causes: but a sentence of condemnation can be founded only on a conviction of guilt.

When the prisoner pleads that he is not guilty; he, for the trial of his plea, puts himself upon his country. The extensive and the emphatick import of this expres-

sion, neglected because it is common, was fully illustrated on another occasion. [b]

In ancient times, a variety of methods, by which crimes might be tried, was known to the common law. A trial might be had by ordeal; and this species of trial was either by fire or by water. The corsned, or morsel of execration, was another kind of trial. The trial by battle was a third kind. A fourth kind still remains and is our boast—the trial by jury. This trial, both in the United States and in this commonwealth, is a part of the constitution as well as of the law.

The history and the general principles of this institution, celebrated so long and so justly, have already been explained to you at large. I shall, therefore, confine myself at present to such remarks, chiefly of a practical nature, as will arise from the usual course of proceedings in trials for crimes.

By the constitution of Pennsylvania, [c] persons accused of crimes shall be tried by an impartial jury of the vicinage: or, in legal interpretation, of the county. [d] By the national constitution, [e] crimes committed in any state shall be tried in that state: and by a law of the United States, [f] twelve, at least, of the jurors must be summoned from the very county, in which the crime was committed.

In the court of king's bench, there is time allowed between the arraignment and the trial, for a jury to be

[b] Ante. vol. 2. p. 311. 351. [c] Art. 9. s. 9. [d] 2. Hale. P. C. 264.

[e] Art. 3. s. 3. [f] 1. cong. 1. sess. c. 20. s. 29.

impanelled by a writ of *venire facias* directed to the sheriff. But justices of oyer and terminer and general gaol delivery, and justices of the quarter sessions[g] of the peace, may, by a bare award and without any writ or precept, have a panel returned by that officer: for, in consequence of a general precept directed to him beforehand, he returns to the court a panel of jurors to try all persons, who may be called upon for their trial at that session. Before such justices, it is usual, for this reason, to try criminals immediately or soon after their arraignment.[h]

Jurors must be "*homines liberi et legales*," men free and superiour to every legal exception; for every legal exception is a cause of challenge. My Lord Coke[i] enumerates four such causes—propter honoris respectum—propter defectum—propter delictum—propter affectum. The first cause relates to the peerage solely: the second is an exception against aliens and minors: the third is an exception against persons convicted of infamous crimes: the fourth is an exception which arises from bias or partiality. When this bias is apparent, the challenge founded on it is a *principal* one, and takes effect immediately: when the bias is only probable, the challenge is only to *the favour*; and its validity must be decided by triers, selected by the court for this purpose, till two are sworn of the jury. These two, as they are acknowledged or found to be impartial, become the triers of all the others.

Besides these challenges for cause, which operate as frequently as they exist, the benignity of the common

[g] Wood. Ins. 666. [h] 4. Bl. Com. 344, 345. 2. Haw. 405. [i] 1, Ins. 156. b.

law allows, as we saw before, every person indicted for a capital crime to challenge peremptorily, or without cause, any number of jurors under thirty six—the number of three juries.[j] In every capital crime, except treason, this number is, by a law of the United States,[k] reduced to twenty jurors. A person who challenges more than the number allowed, is, by the same law, to be treated as one who stands mute. That treatment we have already seen. By a law of Pennsylvania, a similar deduction is made in the number of peremptory challenges: but he, who challenges more than the number allowed, shall suffer as a criminal convicted.[l] There is a great difference between the two provisions: by that of the United States, the person indicted is treated as one who must be *tried*: by that of Pennsylvania, he is treated as one, who is *already convicted*.[m]

When an alien is tried, one half of his jury should be aliens, if he require it.[n]

On this subject of challenges it is proper to observe, that it seems to have been very familiar in the Roman law, during the existence of the commonwealth. In a criminal process, before the court of the prætor, the accuser and the accused were each allowed to except against fifteen of those returned to try the cause. This exception was denominated "*rejectio judicum*"—in the phraseology of our law, the challenge of the jury. Whenever Cicero

[j] 2. Haw. 413. [k] 1. cong. 2. sess. c. 9. s. 30. [l] 1. Laws. Penn. 134.

[m] The law of Pennsylvania is now similar to that of the United States. 3. Laws Penn. 119. *Ed.*

[n] 3. Bl. Com. 360. 4. Bl. Com. 346. 2. Haw. 420. 1. Dall. 73.

uses the expression—judices; its legal translation is —Gentlemen of the jury.

Concerning the celebrated trial of Milo, we have a number of particular facts transmitted to us, which deserve our particular notice and attention. On the first day of the trial, or, as we would say, on the return of the *venire facias*, the *judices*—we would say the jury—were produced, that they might be balloted. The next day, they balloted eighty one persons to make up the jury. But the accuser had the liberty to challenge fifteen; and the accused could challenge as many. By these challenges on both sides, the number of those who were to give the verdict was reduced to fifty one. In another place we have a particular account of the votes given for, and of those given against, Milo: added together, they amount to the precise number of fifty one. [o]

At Rome, as we have seen on more occasions than one, prosecutions were considered as the causes of the accusers, rather than as the causes of the commonwealth. The proceedings were regulated by this supposition. Accordingly, in a criminal prosecution, the challenge extended to such persons as either party—the accuser as well as the accused—had reason, or thought he had reason, to suspect might be influenced in their verdict by favour, affection, consanguinity, malice, or any other passion, which might lead to partiality or a corrupt judgment. [p]

When a prosecution, as well as the defence of it, was viewed as the cause of an individual, it might be reasonable enough that, in this view, the power of challenging

[o] Pet. on Jur. 114. [p] Id. 180.

jurors should, on both sides, be equal. But when a prosecution is considered as the cause of the community, by a part of which community this very cause is to be tried; matters now assume a very different appearance. This important difference was fully explained in the account which I gave of the radical principles, as I may call them, of the trial by jury.[q] The accused stands alone on one side: on the other side stand the whole community: the jury are indeed a *selected* part; but still they are a *part* of the whole community: the power of challenging, therefore, ought not, on both sides, to be equal.

True it is, that, at the common law, the king might challenge peremptorily, as well as the prisoner. The distinction between a publick and a private prosecutor was not sufficiently regarded. From this characteristick feature, by the way, a strong intrinsick evidence appears of the lineage of juries. But equally true it is, that the distinction was perceived at an early period, was then established—I mean in the reign of Edward the first—and has been since uniformly observed.[r] In consequence of this distinction, it has been the law, for many centuries past, that the privilege of peremptory challenges, though enjoyed by the prisoner, is refused to the king.

If, on account of the number of challenges, or the non-attendance of the jurors, so many of the panel returned as are necessary to make a jury cannot be had, the court may award a *tales*—others qualified in the same manner—to be added to the panel, till twelve are sworn to try the cause.[s]

[q] Ante. vol. 2. p. 314. 315. 2. Haw. 412. [r] 4. Bl. Com. 348.

Their oath is—that they will well and truly try and true deliverance make between the—United States—and the prisoner at the bar, and a true verdict give according to their evidence. After they are sworn, the indictment is read, and the issue which they are sworn to try is stated to them: and then the publick prosecutor opens the cause, and arranges, in such order as he thinks most proper, the evidence which is to be offered in support of the prosecution.

But it is a settled rule at the common law, as it is *now* received in England, that, in a trial for a capital crime, upon the general issue, no counsel shall be allowed the prisoner, unless some point of law, proper to be debated, shall arise. By a statute, however, made in the reign of William the third, and by another made in that of George the second, an exception to this general and severe rule is introduced, for the benefit of those who are indicted or impeached for treason.[t] This practice in England is admitted to be a hard one, and not to be very consonant to the rest of the humane treatment of prisoners by the English law. Indeed the judges themselves are so sensible of this defect in their modern practice, that they generally allow a prisoner counsel to stand by him at the bar, and instruct him what questions to ask, or even to ask questions for him.

This practice of refusing counsel to those who are indicted for a capital crime, is not agreeable to the common law as it was formerly received in England. The ancient Mirrour tells us, that, in civil causes, counsel are necessary to manage and to defend them, by the rules of

[t] 4. Bl. Com. 349, 350.

law and the customs of the realm. He adds, with irresistible force, that they are still more necessary to defend indictments of felony, than causes of a less important nature.[u] On this, as on many other great and interesting subjects, we have renewed the ancient common law. It is enacted by a law of the United States,[v] that persons indicted for crimes shall be allowed to make their full defence by counsel learned in the law. It is declared by the constitution of Pennsylvania,[w] that, in all criminal prosecutions, the accused has a right to be heard by himself and his counsel.

In England, it has been an ancient and commonly received practice, that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of witnesses. This doctrine was so unreasonable and severe, that the courts became ashamed of it, and gradually introduced a practice of examining witnesses for the prisoner: but they stopped in the middle of the road to redress—they would not examine the witnesses upon their oaths. The consequence was, that juries gave less credit to witnesses produced on the part of the prisoners, than to witnesses produced on the part of the crown.[x]

This practice, however, like the last, is not agreeable to the common law, as it was in ancient times received in England. To say the truth, says my Lord Coke,[y] we never read in any act of parliament, ancient author, bookcase, or record, that in criminal cases, the party accused

[u] Mir. c. 3.

[v] 1. cong. 2. sess. c. 9. s. 29.

[w] Art. 9. s. ..

[x] 4. Bl. Com. 352.

[y] 3. Ins. 79.

should not have witnesses sworn for him; and therefore there is not so much as a *scintilla juris* against it. By a statute made in the reign of Queen Anne, the ancient common law on this point is renewed in England; and witnesses for the prisoner shall be examined upon oath, in the same manner as witnesses against him. [z]

On this subject, the ancient common law, as might have been expected, is renewed in the United States and in Pennsylvania. By a law of the former [a] it is provided, that persons indicted for crimes shall be allowed to make proof in their defence by lawful witnesses; and that, to compel the appearance of their witnesses, the court shall grant the same process as is granted to compel witnesses to appear on the prosecution. By the constitution of Pennsylvania, [b] it is declared, that, in all criminal prosecutions, the accused has a right to have compulsory process for obtaining witnesses in his favour.

The compulsory process for obtaining witnesses is a subpœna *ad testificandum*, which commands them to appear at the trial. If this command is disobeyed, an attachment issues for the contempt. [c]

In honour of the Founder of Pennsylvania it ought to be observed, that, in the charter of privileges [d] which he granted to its inhabitants, he declared, "that all criminals shall have the same privileges of witnesses and counsel as their prosecutors." On this as on many other subjects, Pennsylvania preceded England in point of liberal and enlightened improvement.

[z] St. 2. An. st. 2. c. 9. [a] 1. cong. 2. sess. c. 9. s. 29.

[b] Art. 9. s. 9. [c] 3. Bl. Com. 369. [d] S. 5.

The constitution of Pennsylvania[e] declares, that, in all criminal prosecutions, the accused has a right to meet the witnesses face to face. Those who know the nature and the mischiefs of secret accusations, know the importance of this provision, and the security which it produces.

By the constitution of the United States,[f] no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. The subject of confession has been already treated.

The courts of justice, in almost every age, and in almost every country, have had recourse to oaths, or appeals to heaven, as the most universal and the most powerful means to engage men to declare the truth. By the common law, before the testimony of a witness can be received, he is obliged to swear, that it shall be the truth, the whole truth, and nothing but the truth.

The testimony of witnesses is one species of evidence, as we formerly saw in those lectures,[g] in which the great subject of evidence was opened, and but just opened. The general principles, upon which testimony is received and believed, were then stated in a short and summary manner, as connected with some native propensities of the human mind. The important distinction between the credibility of witnesses and their competency was explained at large,[h] when I discoursed concerning the separate provinces of courts and juries. I observed, that every intelligent person, who is not infamous or interested,

[e] Art. 9. s. 9.

[f] Art. 3. s. 3.

[g] Ante, vol. 2. p. 88. et seq.

[h] Ante. vol. 2. p. 275—280.

is a competent witness. The common law coincides, in this point, with the law of Athens: for, by that law, no man could be a witness in his own cause; and he who, by his ill behaviour, had rendered himself infamous—ἄτιμος—was deemed unworthy of credit. [i]

The Marquis of Beccaria is of opinion, that the objection against the competency of a witness should be confined altogether to his interest; and that his infamy should not exclude him. Every man of common sense, says he, every one whose ideas have some connexion with each other, and whose sensations are conformable to those of other men, may be a witness; but the credibility of his testimony will be in proportion as he is interested in declaring or concealing the truth. Hence it appears how irrational it is to exclude persons branded with infamy; for they ought to be credited when they have no interest in giving false testimony. [j]

If this subject is investigated upon principle, it will, perhaps, be found, that the practice of the law is more congenial to the native sentiments of our mind, than are the speculations of the ingenious philosopher.

Belief is the end proposed by evidence of every kind. Belief in testimony is produced by the supposed veracity of him who delivers it. The opinion of his veracity, as we saw when we examined the general principles of testimony, [k] is shaken, either when, in former instances, we have known him to deliver testimony which has been

[i] 1. Pot. Ant. 117.

[j] Bec. c. 13.

[k] Ante. vol. 2. p. 94. 95.

false; or when, in the present instance, we discover some strong inducement which may prevail on him to deceive. The latter part of this observation applies to interested witnesses; and the application to them is admitted to be a proper one, and to be sufficient to exclude them from testimony. But who is a person infamous in the eye of the common law? He who has been convicted of an infamous crime. What, in the eye of the common law, is an infamous crime? When we investigated the true meaning of the *felleus animus*, according to the common law, we found that it indicated a disposition, deceitful, false, and treacherous.[1] He who is convicted of an infamous crime, is one who has been proved guilty of some conduct, which evinced him to have been false—to have committed the *crimen falsi;* of which so many different grades—from treason to a cheat, and both included—are known to the law.

It may, however, be urged, on the principles of Beccaria, that to the conduct of which he has been convicted, he was probably drawn by a motive of interest; and that, if no such motive exists in the present instance, the inference from the past to the present is without foundation. To this it may be justly answered, that the reason why interest excludes a witness is not, because it certainly will, but because it possibly may, occasion a deviation from the truth; and because this deviation may be produced even by an involuntary and imperceptible bias, which interest will sometimes impress upon minds intentionally honest. That this last consideration has great weight in the judgment of the law, is evident from one of the modes which it adopts to discover the existence

[1] Ante. p. 23.

of interest—a mode, which, I believe, can be rationally accounted for only by this last consideration. A witness, who is suspected to be interested, may be examined upon his *voir dire*—in other words, he may be required to declare, upon oath, whether he is interested or not. This mode of proceeding obviously supposes him honest as well as interested. For if it supposed him dishonest, would not the conclusion be irresistible—that he who ought not to be believed when he gives his testimony *in chief*, as it is called, ought as little to be believed, when he gives his testimony on his *voir dire*? That involuntary and unavoidable bias which interest sometimes impresses on the mind, and which, of consequence, may affect the testimony of the offered witness, is deemed by the law a sufficient reason for his exclusion from testimony.

If he whose testimony may deceive, merely because he is interested, though he be honest, shall for this reason be excluded; shall we admit the testimony of one who is false, though he be disinterested? The former is rejected, because he *may be* biassed involuntarily; for the danger of even an involuntary bias is, for this purpose, sufficient: and shall one, whom interest *has* biassed voluntarily and infamously—shall such a one be received? On good grounds, therefore, are persons infamous excluded from giving testimony.

That evidence which arises from testimony is, in the law, denominated positive. There is another kind, which the law terms presumptive. When the fact itself cannot be proved by witnesses, that which comes nearest to such proof is, the proof of such circumstances, with which the fact is either necessarily or usually attend-

ed. This is presumptive evidence. When those circumstances are proved, with which the fact is *necessarily* attended, the presumption is said to be violent: when those circumstances only are proved with which the fact is *usually* attended, the presumption is said to be only probable. [m]

Presumptive proof, as described by the common law, coincides with that species which, in our general view of the sources of evidence, we saw rising from experience. On that occasion, [n] it was observed, that if an object is remembered to have been frequently, still more, if it is remembered to have been constantly succeeded by certain particular consequences, the conception of the object naturally associates to itself the conception of the consequences; and on the actual appearance of the object, the mind naturally anticipates the appearance of the consequences also: that if the consequences have followed the object *constantly*, and the observations of this constant connexion have been sufficiently numerous; the evidence produced by experience amounts to a moral certainty: that, if it has been *frequent*, but not entirely uniform; the evidence amounts only to probability, and is more or less probable, as the connexion has been more or less frequent. Violent presumption, as it is termed by the law, or moral certainty, as it is denominated by philosophy, amounts to full proof: probability, or probable presumption, has also its due weight. [o] The coincidence between philosophy and law is a coincidence which, to the friends of both, always gives pleasure.

[m] 3. Bl. Com. 371.

[n] Ante vol. 2. p. 100.

[o] 1. Ins. 6. b.

[p] 3. Bl. Com. 372.

It ought to be observed here, that, in cases of a capital nature, all presumptive proof should be received with caution: for the law benignly holds that it is more eligible that ten guilty persons should escape, than that one innocent person should suffer a capital punishment.

After the evidence is heard, the jury are next to consider what verdict they ought to give upon it; for they are sworn, as we have seen, to give a true verdict according to their evidence. To give a verdict is the great purpose for which they are summoned and empanelled. Till they give a verdict, therefore, they cannot be discharged.[q] This verdict may either be special—in other words, it may state particularly the facts arising in the cause, and leave to the court the decision of the law resulting from those facts; or it may be general—in other words, it may determine both the facts and the law. A general verdict is either guilty or not guilty: on a verdict of not guilty, the prisoner is discharged: by a verdict of guilty, he is convicted: on a conviction the judgment and the punishment pronounced and inflicted by the law regularly follow, unless they are intercepted by errour in the proceedings, by a reprieve, or by a pardon.

When a sentence of death is pronounced, the immediate and inseparable consequence, by the common law, is attainder. The law puts him out of its protection, considers him as a bane to human society, and takes no farther care of him than barely to see him executed: he is already considered as dead in law. There is, in capi-

[q] 4. Bl. Com. 354.

tal cases, a great difference between a man convicted and one attainted. Till judgment is given, there is, in such cases, still a possibility of innocence in the contemplation of the law. r

In England the consequences of attainder are forfeiture, escheat, and corruption of blood. Concerning these subjects we have already treated fully.

I have now enumerated and described the several crimes, the several punishments, and the modes of prosecuting criminals. In doing this, I have conformed myself to the common law and to the improvements made upon it by the constitutions and laws of the United States and of Pennsylvania.

r 4. Bl. Com 373.

THE END OF THE LECTURES ON LAW.

ON

# THE HISTORY OF

# PROPERTY.

ON

# THE HISTORY OF PROPERTY.

PROPERTY is the right or lawful power, which a person has to a thing. Of this right there are three different degrees. The lowest degree of this right is a right merely to possess a thing. The next degree of this right is a right to possess and to use a thing. The next and highest degree of this right is a right to possess, to use, and to dispose of a thing.

This right, in all its different degrees, may be vested in one, or it may be vested in more than one man. When this right is vested in more than one man, it may be vested in them either as a number of individuals, or as a body politick.

Concerning the origin and true foundation of property, or the right of persons to things, many opinions have been formed and entertained. With regard to property in land, Mr. Paley declares, that the real foundation of

it is municipal law.[a] Others consider property as a natural right; but as a right, which may be extended or modified by positive institutions.[b]

The general property of man in animals, in the soil, and in the productions of the soil, is the immediate gift of the bountiful Creator of all. "God created man in his own image; in the image of God created he him: male and female created he them. And God blessed them; and God said unto them, be fruitful and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[c] Immediately after the deluge, the great charter of general property was renewed. "God blessed Noah and his sons, and said unto them, be fruitful and multiply, and replenish the earth. And the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, and upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered. Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things."[d]

The information which is expressly revealed is congenial to those inferences, which may be drawn by sound and legitimate reasoning. Food, raiment, and shelter are necessary and useful to us. Things proper for our food, raiment, and shelter are provided around us. It is natural to conclude, that those things were provided to supply our wants and necessities. The same train of

[a] 1. Paley. 133. 138.

[b] Ins. 2. 1. 11. El. Jur. 15.

[c] Gen. i. 27. 28.

[d] Gen. ix. 1, 2, 3.

reasoning will apply to the enjoyments, as well as to the necessities of man.

While men were few, and the supplies of every thing were abundant, it is probable that many things were possessed and used in common. With regard to the possession and use of some things, however, this could never be strictly the case. In the fruit plucked or gathered by one for his subsistence; in the spot which he occupied for his shelter or repose; in the bow which he has made for ensuring his safety, or procuring his subsistence; in the skin which he has obtained by his skill and swiftness in the chace, and which covers his body from the inclemency of the weather, he gains a high degree of exclusive right; and of this right he cannot be dispossessed without a proportioned degree of injustice. "A publick theatre," says Cicero,[e] with his usual luminous propriety, "is common to all the citizens; but the seat which each occupies may, during the entertainment, be denominated his own." But, in the early period of society, concerning which we now speak, things, in general, would be viewed as belonging equally to all; in other words, to those who should first have occasion to use or possess them.

In this situation, we have reason to believe, society continued after the deluge, while "the whole earth was of one language and of one speech."[f] On the confusion of languages, and the dispersion of families, when man-

[e] De fin. l. 3. c. 20.

[f] Gen. xi. 1. Erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset. Just. l. 43. c. 1.

kind dwelt no longer in "the same plain,"[s] this general society was dissolved, and no one subject of property could, in this new situation, be reasonably deemed as belonging equally to all. The different families and associations, however, who diverged from the common centre of emigration, would still consider many things, and particularly the country in which they commenced their new settlements, as common to each family or association.

The things most immediately necessary to the subsistence of life would become the first objects of exclusive property. The next objects would be such as ministered to its conveniency and comfort. Personal property, or property in movables, would become separate; while real property, or property in land, would continue common. When the association became too numerous, and the personal property of its members became too large, to subsist or live commodiously together; then a separation of landed possessions necessarily took place. Of these remarks we have a strong and striking illustration in the history of Abram and Lot. "Abram was very rich in cattle: Lot also had flocks, and herds, and tents. And the land was not able to bear them that they might dwell together; for their substance was great. And there was a strife between the herdmen of Abram's cattle and the herdmen of Lot's cattle. And Abram said unto Lot, let there be no strife, I pray thee, between thee and me, and between my herdmen and thy herdmen; for we be brethren. Is not the whole land before thee? Separate thyself, I pray thee, from me: if thou wilt take the left hand, then will I go to the right: or if thou

[s] Gen. xi. 2.

depart to the right hand, then I will go to the left. And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where. Then Lot chose him all the plain of Jordan: and they separated themselves the one from the other." [h]

Even after agriculture became known and was practised in some imperfect degree, still the land continued to be the common property of the association. Cecrops, who emigrated from civilized Egypt, was the first to teach the wandering hunters or shepherds of Attica to unite in villages of husbandmen. After their union, their agricultural labours were carried on in common; and the soil, together with its immediate productions, corn, and wine, and oil, were regarded as a common property. [i] Agreeably to the same spirit and the same policy, we are told, that during the heroick ages of Greece, when a tribe sallied from its woods and mountains to take possession of a more fertile territory, the soldiers fought and conquered, not for their leaders, but for themselves—that the land acquired by their joint valour was their common right—and that it was cultivated by the united labour and assiduity of all the members of the tribe. [j]

In this stage of society, land was considered as the property of the community, rather than of individuals; and the inhabitants were connected with the country which they inhabited, only as members of the same association. [k] In this view of things, the famed establishment

[h] Gen. xiii. 2. 5.—11.

[i] 1. Gill. 8. [j] Id. 48. [k] Id. 68.

of a community of property, which Lycurgus made at Sparta, may be deemed nothing more than a renewal of their primitive institutions, of which some traces probably remained among the simple Spartans.[l]

The Scythians, it is well known, appropriated their cattle and tents, but occupied their land in common. Such, to this day, are the laws and customs of the Tartars.

Of the Suevi,[m] the largest and most powerful tribe of the ancient Germans, we are informed by Cæsar, that they had no private or separate property in their land; that, every year, they sent out a proportion of their warriours in order to make war; while the rest remained at home, and cultivated the ground for all; that these warlike enterprises and peaceful occupations were pursued, in alternate years, by the different divisions of the warriours; that the tribe continued only one year in the same place; that they used corn very little; but lived chiefly on milk and flesh; and were much employed in hunting. From the pen of Tacitus[n] we have nearly the same de-

l 1. Gill. 96.

m Suevorum gens est longe maxima et bellicosissima Germanorum omnium—privati ac separati agri apud eos nihil est—quotannis singula millia armatorum, bellandi causa, suis ex finibus educunt: reliqui domi manent; pro se atque illis colunt. Hí rursus invicim anno post in armis sunt: illi domi remanent—neque longius anno remanere uno in loco, incolendi causa, licet; neque multum frumento, sed maximam partem lacte atque pecore vivunt, multumque sunt in venationibus. Cæs. l. 4. c. 1. l. 6. c. 21.

n Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia prestant. Arva per annos mutant; et superest ager. Tac. de mor. Ger. c. 26.

scription. They change, says he, from spot to spot; and make new appropriations according to the number of hands, and to the condition and quality of each. As the plains are very spacious, the allotments are easily assigned: for though they shift their situation annually, they have still lands to spare.

In Tacitus, however, we begin to discover some appearances, among the Germans, of a private property in lands. To a certain class of their slaves, we are told, their masters assigned habitations; and from them, as from tenants, demanded in return a certain quantity of grain, or cattle, or cloth.[o] This presupposes, in the masters, a separate property in the lands let to those slaves.

In the Highlands of Scotland, we are told, common possession of the cultivated soil, as well as of the pasture grounds, is known to this day. The arable lands are divided into as many parts, as there are tenants entitled to an equal share of possession. The stock of cattle belonging to each tenant is considered as equal: the advantages accruing to the several partitions from manure are deemed also to be equivalent; yet some portion of these divisions shifts annually from one possessor to another, in such a manner, that, in a certain period of years, every tenant of the village has occupied and reaped crops from all the lands belonging to the village.[p]

[o] Servis utuntur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit. Tac. de mor. Ger. c. 25.

[p] Grant's Ess. 97.

It is said, that, among the Indians of Peru, the territory occupied was the property of the state, and was regulated by the magistrate; and that, when individuals were permitted to possess particular spots, these, in default of male issue, returned to the community.[q] Formerly, says Mr. Adair, the Indian law obliged every town to work together in one body, in sowing or planting their crops; though their fields are divided by proper marks, and their harvest is gathered and appropriated separately.[r] The ideas and opinions of private and exclusive property are, as we have reason to believe, extending gradually among the Indians; though their uncultivated territory is still considered as the common property of the nation or tribe.

From the detail which we have given, we are justified in deducing this general remark—that in the early and rude periods of society among all nations, the same family or association enjoyed and were understood to enjoy in many things a community of property, especially of landed property; and that, as to individuals, property was conceived to extend no farther than to those degrees, which comprehend the right of possession and temporary use of the soil.

But agriculture, and the industry attendant on agriculture, introduced gradually a new scene of things, and a new train of sentiments. This first of arts was not unknown to the restorer of mankind. Noah, after the deluge, began to be a husbandman, and he planted a vineyard.[s] Before the confusion of languages, the whole human race dwelt in the plain of Shinar. In that plain

[q] Stu. V. 158. cites Com. Per. b. 5. c. 1. 3. [r] Id. ibid. [s] Gen. ix. 20.

and its neighbourhood, the knowledge of agriculture was never entirely lost. Among the Babylonians, it is traced to the most early periods of their history. In the fertile territories of Egypt, watered by the Nile, the soil was cultivated with much assiduity and success.[t] When a famine, in the days of Abram, was grievous in the land of Canaan, the patriarch went down into Egypt to sojourn there.[u] On a similar occasion, Jacob said to his sons, who, with unavailing anguish, beheld the distressed situation of the family—Why do ye look one upon another? I have heard that there is corn in Egypt; get ye down thither, and buy for us from thence, that we may live, and not die.[v]

From Egypt, as we have already seen, the art of agriculture was transplanted into Attica by Cecrops. Before his arrival, the inhabitants had relied on the reproductions of the uncultivated soil for their annual subsistence; but, by the example of the Egyptians, skilled in agriculture, they were induced to submit to labour, and contract habits of useful industry.[w]

It is the observation of Cicero, that the greatest part of the arts and discoveries, which are necessary or ornamental to life and society, were derived from the Athenians into the other parts of Greece, and then into foreign countries, for the general advantage and refinement

[t] Osiris, one of the kings of Egypt, is regarded as the inventor of the plough.

Primus aratra manu solerti fecit Osiris. Tibul. l. 1. Eleg. 7. v. 29.

[u] Gen. xii. 10. [v] Gen. xlii. 1, 2. [w] 1. Anac. 6.

of the human race.[x] Agriculture, in particular, was brought from Greece into Italy, according to the account of this matter given by the Romans themselves.[y] As the Egyptians taught the Greeks; so the Greeks communicated their knowledge to the Italians. For many ages, the Romans knew no other form of a plough, than that which, to this day, is used in some districts of the higher Egypt.[z]

The wise and virtuous Numa was the patron of agriculture. He distributed the Romans into pagi or villages, and over each placed a superintendant to prevail with them, by every motive, to improve the practice of husbandry. To inspire their industry with redoubled vigour, he frequently condescended to be their overseer himself. This wise and judicious policy had a most happy influence upon the subsequent manners and fortunes of Rome. Our consuls, says the Roman Orator,[a] were called from the plough. Those illustrious characters, who have most adorned the commonwealth, and have been best qualified to manage the reins of government with dignity and success, dedicated a part of their time and of their labour to the cultivation of their landed estates. In those glorious ages of the republick, the farmer, the judge, and the soldier were to each other a reciprocal ornament. After having finished the publick business with glory and advantage to himself and to

[x] 1. Pot. Ant. 138. [y] 1. Gog. Or. Laws. 88. [z] Id. 90.

[a] Ab aratro arcessebantur, qui consules fierent—Apud majores nostros, summi viri, clarissimique homines, qui omni tempore ad gubernacula reipublicæ sedere debebant, tamen in agris quoque colendis aliquantum operæ temporisque consumserint. Cic. pro Ros. Am. c. 18.

his country, the Roman magistrate descended, with modest dignity, from the elevation of office; and reassumed, with contentment and with pleasure, the peaceful labours of a rural and independent life.

When agriculture was once introduced, and its utility was known and experienced; it became natural to search and adopt the measures necessary for distinguishing possessions permanently; that every one who laboured and who excelled in this fundamental profession, might be secured in enjoying the fruits of his labours and his improvements. Hence the foundation of laws, which instituted and regulated the division and stable possession of the soil. Hence, too, the origin and the importance of land marks. In the early period in which Job lived, it was part of the description of a turbulent and wicked man, that he removed the land marks, and violently took away flocks.[b] The inspired legislator of the Jews speaks of them as of an institution, which, even in his time, was anciently established in Canaan. "Thou shalt not remove thy neighbour's land mark, which they of old time have set in thy inheritance, which thou shalt inherit in the land that the Lord thy God giveth thee to possess it."[c] Numa, mild as he was, ordered those who were guilty of this crime, to suffer a capital punishment.[d]

The inference which we draw from this long detail of facts is—that agriculture gave rise to that degree of property in land, which consists in the right of exclusive and permanent possession and use.

[b] Job xxiv. 2. [c] Deut. xix. 14. [d] 1. Gog. Or. Laws. 32.

We have seen that among the ancient Germans, this degree of property was altogether unknown. The Saxons, who emigrated into England, and made a conquest there, were a part of the ancient German nation. Their settlement in England produced, with regard to the present subject, a considerable change in their sentiments and habits. After they settled in England, instead of continuing to be hunters, they became husbandmen. In pursuing this occupation, they ceased to wander annually from spot to spot; they became habituated and attached to a fixed residence; they acquired a permanent and an exclusive degree of property in land. This degree, among them, as among other nations, proceeded from their improvement in agriculture.[e]

We have good reason for believing, that, for some time after the settlement of the Saxons in England, the landed estatesac quired by individuals were, in general, but of a small extent. Inexpert in agriculture when they first arrived, their progress in the separate appropriation of land was, therefore, slow. This slow appropriation met, besides, with obstructions and interruptions from the vigorous opposition of the Britons, who, for centuries, disputed every inch of ground with the invaders of their country. Conformably to this opinion, we find that, from the beginning of the Saxon government, the land was divided into hides. A hide comprehended as much as could be cultivated by a single plough. The general estimation of real property, by this small and inaccurate measure, points, with sufficient clearness, to the leading circumstance, which originally marked and regulated the greatest number of landed estates.[f]

[e] Millar, 50. [f] Id. 85. 144. 181.

But we have also good reason for believing, that, among the Saxons, the smallness of their landed property was compensated by its independence. They were freemen; and their law of property was, that they might challenge a power to do what they pleased with their own.[z] But this degree and quality of property will be considered afterwards.

Having traced property, and especially property in land, from its general to its separate and exclusive state, it will now be proper to consider the advantages, which the latter state possesses over the former.

This superiority of separate over common property has not been always admitted: it has not been always admitted even in America. In the early settlement of this country, we find two experiments on the operation and effects of a community of goods. The issue of each, however, was very uncomfortable.

The first was made in Virginia. An instruction was given to the colonists, that, during five years next after their landing, they should trade jointly; that the produce of their joint industry should be deposited in a common magazine; and that, from this common magazine, every one should be supplied under the direction of the council. What were the consequences? I relate them in the words of the Historian of Virginia. "And now the English began to find the mistake of forbidding and preventing private property; for whilst they all laboured jointly together, and were fed out of the common store, happy

[z] Bac. on Gov. 122.

was he that could slip from his labour, or slubber over his work in any manner. Neither had they any concern about the increase; presuming, however the crop prospered, that the publick store must maintain them. Even the most honest and industrious would scarcely take so much pains in a week, as they would have done for themselves in a day."[h]

The second experiment was made in the colony of New Plymouth. During seven years, all commerce was carried on in one joint stock. All things were common to all; and the necessaries of life were daily distributed to every one from the publick store. But these regulations soon furnished abundant reasons for complaint, and proved most fertile sources of common calamity. The colonists were sometimes in danger of starving; and severe whipping, which was often administered to promote labour, was only productive of constant and general discontent. This absurd policy became, at last, apparent to every one; and the introduction of exclusive property immediately produced the most comfortable change in the colony, by engaging the affections and invigorating the pursuits of its inhabitants.[i]

The right of separate property seems to be founded in the nature of men and things; and when societies become numerous, the establishment of that right is highly important to the existence, to the tranquillity, to the elegancies, to the refinements, and to some of the virtues of civilized life.

[h] Stith. 39. [i] Chal. 89. 90.

Man is intended for action. Useful and skilful industry is the soul of an active life. But industry should have her just reward. That reward is property; for of useful and active industry, property is the natural result.

Exclusive property multiplies the productions of the earth, and the means of subsistence. Who would cultivate the soil, and sow the grain, if he had no peculiar interest in the harvest? Who would rear and tend flocks and herds, if they were to be taken from him by the first person who should come to demand them?

By exclusive property, the productions of the earth and the means of subsistence are secured and preserved, as well as multiplied. What belongs to no one is wasted by every one. What belongs to one man in particular is the object of his economy and care.

Exclusive property prevents disorder, and promotes peace. Without its establishment, the tranquillity of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each.

The conveniencies of life depend much on an exclusive property. The full effects of industry cannot be obtained without distinct professions and the division of labour. But labour cannot be divided, nor can distinct professions be pursued, unless the productions of one profession and of one kind of labour can be exchanged

for those of another. This exchange implies a separate property in those who make it.

The observations concerning the conveniencies of life, may be applied with equal justness to its elegancies and its refinements.

On property some of the virtues depend for their more free and enlarged exercise. Would the same room be left for the benign indulgence of generosity and beneficence—would the same room be left for the becoming returns of esteem and gratitude—would the same room be left for the endearing interchange of good offices, in the various institutions and relations of social life, if the goods of fortune lay in a mass, confused and unappropriated?

For these reasons, the establishment of exclusive property may justly be considered as essential to the interests of civilized society. With regard to land, in particular, a separate and exclusive property in it is a principal source of attachment to the country, in which one resides. A person becomes very unwilling to relinquish those well known fields of his own; which it has been the great object of his industry, and, perhaps, of his pride, to cultivate and adorn. This attachment to private landed property has, in some parts of the globe, covered barren heaths and inhospitable mountains with fair cities and populous villages; while, in other parts, the most inviting climates and soils remain destitute of inhabitants, because the rights of private property in land are not established or regarded. *

* The foregoing observations were intended to compose a part of those lectures, in which the Author designed "to trace the

history of property from its lowest rude beginnings to its highest artificial refinements." (Vol. 1. p. 50.) It will be perceived that the piece is indeed but a fragment; as, however, the history of property is so far completed as to trace it from its general to its separate and exclusive state, it is thought worthy of insertion. *Ed.*

# CONSIDERATIONS

## ON THE NATURE AND EXTENT OF THE

## LEGISLATIVE AUTHORITY

OF THE

## BRITISH PARLIAMENT.

PUBLISHED IN THE YEAR M,DCC,LXXIV.

## *ADVERTISEMENT.*

THE following sheets were written during the late non-importation agreement: but that agreement being dissolved before they were ready for the press, it was then judged unseasonable to publish them. Many will, perhaps, be surprised to see the legislative authority of the British parliament over the colonies denied *in every instance*. Those the writer informs, that, when he began this piece, he would probably have been surprised at such an opinion himself; for that it was the *result*, and not the *occasion*, of his disquisitions. He entered upon them with a view and expectation of being able to trace some constitutional line between those cases in which we ought, and those in which we ought not, to acknowledge the power of parliament over us. In the prosecution of his inquiries, he became fully convinced that such a line does not exist; and that there can be no medium between acknowledging and denying that power in *all* cases. Which of these two alternatives is most consistent with law, with the principles of liberty, and with the happiness of the colonies, let the publick determine. To them the writer submits his sentiments, with that respectful deference to their judgment, which, in all questions affecting them, every individual should pay.

*August 17th*, 1774.

ON THE

# LEGISLATIVE AUTHORITY

OF THE

# BRITISH PARLIAMENT.

NO question can be more important to Great Britain, and to the colonies, than this—does the legislative authority of the British parliament extend over them?

On the resolution of this question, and on the measures which a resolution of it will direct, it will depend, whether the parent country, like a happy mother, shall behold her children flourishing around her, and receive the most grateful returns for her protection and love; or whether, like a step dame, rendered miserable by her own unkind conduct, she shall see their affections alienated, and herself deprived of those advantages which a milder treatment would have ensured to her.

The British nation are generous: they love to enjoy freedom: they love to behold it: slavery is their greatest

abhorrence. Is it possible, then, that they would wish themselves the authors of it? No. Oppression is not a plant of the British soil; and the late severe proceedings against the colonies must have arisen from the detestable schemes of interested ministers, who have misinformed and misled the people. A regard for that nation, from whom we have sprung, and from whom we boast to have derived the spirit which prompts us to oppose their unfriendly measures, must lead us to put this construction on what we have lately seen and experienced. When, therefore, they shall know and consider the justice of our claim—that we insist only upon being treated as freemen, and as the descendants of those British ancestors, whose memory we will not dishonour by our degeneracy, it is reasonable to hope, that they will approve of our conduct, and bestow their loudest applauses on our congenial ardour for liberty.

But if these reasonable and joyful hopes should fatally be disappointed, it will afford us at least some satisfaction to know, that the principles on which we have founded our opposition to the late acts of parliament, are the principles of justice and freedom, and of the British constitution. If our righteous struggle shall be attended with misfortunes, we will reflect with exultation on the noble cause of them; and while suffering unmerited distress, think ourselves superiour to the proudest slaves. On the contrary, if we shall be reinstated in the enjoyment of those rights, to which we are entitled by the supreme and uncontrollable laws of nature, and the fundamental principles of the British constitution, we shall reap the glorious fruit of our labours; and we shall, at the same time, give to the world and to posterity an instructive example, that the cause of liberty

ought not to be despaired of, and that a generous contention in that cause is not always unattended with success.

The foregoing considerations have induced me to publish a few remarks on the important question, with which I introduced this essay.

Those who allege that the parliament of Great Britain have power to make laws binding the American colonies, reason in the following manner. "That there is and must be in every state a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside:"[a] "That this supreme power is, by the constitution of Great Britain, vested in the king, lords, and commons:"[b] "That, therefore, the acts of the king, lords, and commons, or, in other words, acts of parliament, have, by the British constitution, a binding force on the American colonies, they composing a part of the British empire."

I admit that the principle, on which this argument is founded, is of great importance: its importance, however, is derived from its tendency to promote the ultimate end of all government. But if the application of it would, in any instance, destroy, instead of promoting, that end, it ought, in that instance, to be rejected: for, to admit it, would be to sacrifice the end to the means, which are valuable only so far as they advance it.

All men are, by nature, equal and free: no one has a right to any authority over another without his consent:

[a] 4. Bl. Com. 48. 49. [b] Id. 50. 51.

all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government. [c]

This rule is founded on the law of nature: it must control every political maxim: it must regulate the legislature itself. [d] The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it. If they have not the first, they are slaves; if they have not the second, they are, every moment, exposed to slavery. For "civil liberty is nothing else but natural liberty, devested of that part which constituted the independence of individuals, by the authority which it confers on sovereigns, attended with a right of insisting upon their making a good use of their authority, and with a moral security that this right will have its effect." [e]

Let me now be permitted to ask—Will it ensure and increase the happiness of the American colonies, that the parliament of Great Britain should possess a supreme, irresistible, uncontrolled authority over them? Is such an authority consistent with their liberty? Have they

[c] The right of sovereignty is that of commanding finally—but in order to procure real felicity; for if this end is not obtained, sovereignty ceases to be a legitimate authority. 2. Burl. 32, 33.

[d] The law of nature is superiour in obligation to any other. 1. Bl. Com. 41.

[e] 2. Burl. 19.

any security that it will be employed only for their good? Such a security is absolutely necessary. Parliaments are not infallible: they are not always just. The members, of whom they are composed, are human; and, therefore, they may err; they are influenced by interest; and, therefore, they may deviate from their duty. The acts of the body must depend upon the opinions and dispositions of the members: the acts of the body may, then, be the result of errour and of vice. It is no breach of decency to suppose all this: the British constitution supposes it: "it supposes that parliaments may betray their trust, and provides, as far as human wisdom can provide, that they may not be able to do so long, without a sufficient control." Without provisions for this purpose, the temple of British liberty, like a structure of ice, would instantly dissolve before the fire of oppression and despotick sway.

It will be very material to consider the several securities, which the inhabitants of Great Britain have, that their liberty will not be destroyed by the legislature, in whose hands it is intrusted. If it shall appear, that the same securities are not enjoyed by the colonists; the undeniable consequence will be, that the colonists are not under the same obligations to intrust their liberties into the hands of the same legislature: for the colonists are entitled to all[g] the privileges of Britons. We have committed no crimes to forfeit them: we have too much spirit to resign them. We will leave our posterity as free as our ancestors left us.

f Bol. Diss. on Part. I. 11. 12. p. 167. 179.

g As the law is the birthright of every subject, so wheresoever they go, they carry their laws with them. 2. P. Wms. 75.

To give to any thing that passes in parliament the force of a law, the consent of the king, of the lords, and of the commons [h] is absolutely necessary. [i] If, then, the inhabitants of Great Britain possess a sufficient restraint upon any of these branches of the legislature, their liberty is secure, provided they be not wanting to themselves. Let us take a view of the restraints, which they have upon the house of commons.

They elect the members of that house. "Magistrates," says Montesquieu, [j] "are properly theirs, who have the nomination of them." The members of the house of commons, therefore, elected by the people, are the magistrates of the people; and are bound by the ties of gratitude for the honour and confidence conferred upon them, to consult the interest of their constituents.

The power of elections has ever been regarded as a point of the last consequence to all [k] free governments. The independent exercise of that power is justly deemed the strongest bulwark of the British liberties. [l] As such,

[h] 4. Ins. 25.

[i] The commons of England have a great and considerable right in the government; and a share in the legislature without whom no law passes. 2. Ld. Ray. 950.

[j] Sp. L. b. 2. c. 2.

[k] The Athenians, justly jealous of this important privilege, punished, with death, every stranger who presumed to interfere in the assemblies of the people.

[l] The English freedom will be at an end whenever the court invades the free election of parliament. Rapin.

A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making

it has always been an object of great attention to the legislature; and is expressly stipulated with the prince in the bill of rights. All those are excluded from voting, whose poverty is such, that they cannot live independent, and must therefore be subject to the undue influence of their superiours. Such are supposed to have no will of their own: and it is judged improper that they should vote in the representation of a free state. What can exhibit in a more striking point of view, the peculiar care which has been taken, in order to render the election of members of parliament entirely free? It was deemed an insult upon the independent commons of England, that their uninfluenced suffrages should be adulterated by those who were not at liberty to speak as they thought, though their interests and inclinations were the same. British liberty, it was thought, could not be effectually secured, unless those who made the laws were freely, and without influence, elected by those for whom they were made. Upon this principle is reasonably founded the maxim in law—that every one, who is capable of exercising his will, is party, and presumed to consent, to an act of parliament.

For the same reason that persons, who live dependent upon the will of others, are not admitted to vote in elections, those who are under age, and therefore incapable of judging; those who are convicted of perjury or subornation of perjury, and therefore unworthy of judging; and those who obtain their freeholds by fraudulent conveyances, and would therefore vote to serve infamous

of laws, which are to bind his liberty and property, is a most transcendant thing and of a high nature. 2. Ld. Ray. 953.

purposes, are all likewise excluded from the enjoyment of this great privilege. Corruption at elections is guarded against by the strictest precautions, and most severe penalties. Every elector, before he polls, must, if demanded by a candidate or by two electors, take the oath against bribery, as prescribed by 2. Geo. 2. c. 24. Officers of the excise, of the customs, and of the post offices; officers concerned in the duties upon leather, soap, paper, striped linens imported, hackney coaches, cards and dice, are restrained from interfering in elections, under the penalty of one hundred pounds, and of being incapable of ever exercising any office of trust under the king.

Thus is the freedom of elections secured from the servility, the ignorance, and the corruption of the electors; and from the interposition of officers depending immediately upon the crown. But this is not all. Provisions, equally salutary, have been made concerning the qualifications of those who shall be elected. All imaginable care has been taken, that the commons of Great Britain may be neither awed, nor allured, nor deceived into any nomination inconsistent with their liberties.

It has been adopted as a general maxim, that the crown will take advantage of every opportunity of extending its prerogative, in opposition to the privileges of the people; that it is the interest of those who have pensions or offices at will from the crown, to concur in all its measures; that mankind in general will prefer their private interest to the good of their country; and that, consequently, those who enjoy such pensions or offices are unfit to represent a free nation, and to have the care of their liberties committed to their hands.[m] All such

[m] There are a few exceptions in the case of officers at will.

officers or pensioners are declared incapable of being elected members of the house of commons.

But these are not the only checks which the commons of Great Britain have, upon the conduct of those whom they elect to represent them in parliament. The interest of the representatives is the same with that of their constituents. Every measure, that is prejudicial to the nation, must be prejudicial to them and their posterity. They cannot betray their electors, without, at the same time, injuring themselves. They must join in bearing the burthen of every oppressive act; and participate in the happy effects of every wise and good law. Influenced by these considerations, they will seriously and with attention examine every measure proposed to them; they will behold it in every light, and extend their views to its most distant consequences. If, after the most mature deliberation, they find it will be conducive to the welfare of their country, they will support it with ardour: if, on the contrary, it appears to be of a dangerous and destructive nature, they will oppose it with firmness.

Every social and generous affection concurs with their interest, in animating the representatives of the commons of Great Britain to an honest and faithful discharge of their important trust. In each patriotick effort, the heartfelt satisfaction of having acted a worthy part vibrates in delightful unison with the applause of their countrymen, who never fail to express their warmest acknowledgements to the friends and benefactors of their country. How pleasing are those rewards! How much to be preferred to that paltry wealth, which is sometimes procured by meanness and treachery! I say sometimes; for meanness and treachery do not always obtain that pitiful re-

ward. The most useful ministers to the crown, and therefore the most likely to be employed, especially in great emergencies, are those who are best beloved by the people; and those only are beloved by the people, who act steadily and uniformly in support of their liberties. Patriots, therefore, have frequently, and especially upon important occasions, the best chance of being advanced to offices of profit and power. An abject compliance with the will of an imperious prince, and a ready disposition to sacrifice every duty to his pleasure, are sometimes, I confess, the steps, by which only men can expect to rise to wealth and titles. Let us suppose that, in this manner, they are successful in attaining them. Is the despicable prize a sufficient recompense, for submitting to the infamous means by which it was procured, and for the torturing remorse with which the possession of it must be accompanied? Will it compensate for the merited curses of the nation and of posterity?

These must be very strong checks upon the conduct of every man, who is not utterly lost to all sense of praise and blame. Few will expose themselves to the just abhorrence of those among whom they live, and to the excruciating sensations which such abhorrence must produce.

But lest all these motives, powerful as they are, should be insufficient to animate the representatives of the nation to a vigorous and upright discharge of their duty, and to restrain them from yielding to any temptation that would incite them to betray their trust; their constituents have still a farther security for their liberties in the frequent election of parliaments. At the expiration of every parliament, the people can make a distinction between those

who have served them well, and those who have neglected or betrayed their interest: they can bestow, unasked, their suffrages upon the former in the new election; and can mark the latter with disgrace, by a mortifying refusal. The constitution is thus frequently renewed, and drawn back, as it were, to its first principles; which is the most effectual method of perpetuating the liberties of a state. The people have numerous opportunities of displaying their just importance, and of exercising, in person, these natural rights. The representatives are reminded whose creatures they are; and to whom they are accountable for the use of that power, which is delegated unto them. The first maxims of jurisprudence are ever kept in view —that all power is derived from the people—that their happiness is the end of government.

Frequent new parliaments are a part of the British constitution: by them only, the king can know the immediate sense of the nation. Every supply, which they grant, is justly to be considered as a testimony of the loyalty and affection, which the nation bear to their sovereign; and by this means, a mutual confidence is created between the king and his subjects. How pleasing must such an intercourse of benefits be! How must a father of his people rejoice in such dutiful returns for his paternal care! With what ardour must his people embrace every opportunity of giving such convincing proofs, that they are not insensible of his wise and indulgent rule!

Long parliaments have always been prejudicial to the prince, who summoned them, or to the people, who elected them. In that called by King Charles I, in the year 1640, the commons proceeded at first, with vigour and a true patriotick spirit, to rescue the kingdom from

the oppression under which it then groaned—to retrieve the liberties of the people, and establish them on the surest foundations—and to remove or prevent the pernicious consequences, which had arisen, or which, they dreaded, might arise from the tyrannical exercise of prerogative. They abolished the courts of the star chamber and high commission: they reduced the forests to their ancient bounds: they repealed the oppressive statutes concerning knighthood: they declared the tax of ship money to be illegal: they presented the petition of rights, and obtained a ratification of it from the crown. But when the king unadvisedly passed an act to continue them till such time as they should please to dissolve themselves, how soon—how fatally did their conduct change! In what misery did they involve their country! Those very men, who, while they had only a constitutional power, seemed to have no other aim but to secure and improve the liberty and felicity of their constituents, and to render their sovereign the glorious ruler of a free and happy people—those very men, after they became independent of the king and of their electors, sacrificed both to that inordinate power which had been given them. A regard for the publick was now no longer the spring of their actions: their only view was to aggrandize themselves, and to establish their grandeur on the ruins of their country. Their views unhappily were accomplished. They overturned the constitution from its very foundation; and converted into rods of oppression those instruments of power, which had been put into their hands for the welfare of the state; but which those, who had formerly given them, could not now reassume. What an instructive example is this! How alarming to those, who have no influence over their legislators—who have no security but that the power, which was originally derived

from the people, and was delegated for their preservation, may be abused for their destruction! Kings are not the only tyrants: the conduct of the long parliament will justify me in adding, that kings are not the severest tyrants.

At the restoration, care was taken to reduce the house of commons to a proper dependence on the king; but immediately after their election, they lost all dependence upon their constituents, because they continued during the pleasure of the crown. The effects soon dreadfully appeared in the long parliament under Charles the second. They seemed disposed ingloriously to surrender those liberties, for which their ancestors had planned, and fought, and bled: and it was owing to the wisdom and integrity of two[a] virtuous ministers of the crown, that the commons of England were not reduced to a state of slavery and wretchedness by the treachery of their own representatives, whom they had indeed elected, but whom they could not remove. Secure of their seats, while they gratified the crown, the members bartered the liberties of the nation for places and pensions; and threw into the scale of prerogative all that weight, which they derived from the people in order to counterbalance it.

It was not till some years after the revolution, that the people could rely on the faithfulness of their representatives, or punish their perfidy. By the statute 6. W. & M. c. 2. it was enacted, that parliaments should not continue longer than three years. The insecure situation of the first prince of the Hanoverian line, surrounded with rivals and with enemies, induced the parliament, soon

[a] The Earls of Clarendon and Southampton.

after his accession to the throne, to prolong this term to that of seven years. Attempts have, since that time, been frequently made to reduce the continuance of parliaments to the former term: and such attempts have always been well received by the nation. Undoubtedly they deserve such reception: for long parliaments will naturally forget their dependence on the people: when this dependence is forgotten, they will become corrupt: "Whenever they "become corrupt, the constitution of England will lose "its liberty—it will perish."[o]

Such is the provision made by the laws of Great Britain, that the commons should be faithfully represented: provision is also made, that faithful representatives should not labour for their constituents in vain. The constitution is formed in such a manner, that the house of commons are able as well as willing to protect and defend the liberties intrusted to their care.

The constitution of Great Britain is that of a limited monarchy; and in all limited monarchies, the power of preserving the limitations must be placed somewhere. During the reigns of the first Norman princes, this power seems to have resided in the clergy and in the barons by

[o] Mont. Sp. L. b. 11. c. 6. If the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, will think themselves bound, in interest as well as duty, to make only such laws as are good. 1. Bl. Com. 189.

turns. But it was lodged very improperly. The clergy, zealous only for the dignity and preeminence of the church, neglected and despised the people, whom, with the soil they tilled, they would willingly have considered as the patrimony of St. Peter. Attached to a foreign jurisdiction, and aspiring at an entire independence of the civil powers, they looked upon the prerogatives of the crown as so many obstacles in the way of their favourite scheme of supreme ecclesiastical dominion; and therefore seized, with eagerness, every occasion of sacrificing the interests of their sovereign to those of the pope. Enemies alike to their king and to their country, their sole and unvaried aim was to reduce both to the most abject state of submission and slavery. The means employed by them to accomplish their pernicious purposes were, sometimes, to work upon the superstition of the people, and direct it against the power of the prince; and, at other times, to work upon the superstition of the prince, and direct it against the liberties of the people.

The power of preserving the limitations of monarchy, for the purposes of liberty, was not more properly placed in the barons. Domineering and turbulent, they oppressed their vassals, and treated them as slaves; they opposed their prince, and were impatient of every legal restraint. Capricious and inconstant, they sometimes abetted the king in his projects of tyranny; and, at other times, excited the people to insurrections and tumults. For these reasons, the constitution was ever fluctuating from one extreme to another; now despotism—now anarchy prevailed.

But after the representatives of the commons began to sit in a separate house; to be considered as a distinct

branch of the legislature; and, as such, to be invested with separate and independent powers and privileges; then the constitution assumed a very different appearance. Having no interest contrary to that of the people, from among whom they were chosen, and with whom, after the session, they were again to mix, they had no views inconsistent with the liberty of their constituents, and therefore could have no motives to betray it. Sensible that prerogative, or a discretionary power of acting where the laws are silent, is absolutely necessary, and that this prerogative is most properly intrusted to the executor of the laws, they did not oppose the exercise of it, while it was directed towards the accomplishment of its original end: but sensible likewise, that the good of the state was this original end, they resisted, with vigour, every arbitrary measure, repugnant to law, and unsupported by maxims of publick freedom or utility.

The checks, which they possessed over prerogative, were calm and gentle—operating with a secret, but effectual force—unlike the impetuous resistance of factious barons, or the boisterous fulminations of ambitious prelates.

One of the most ancient maxims of the English law is, that no freeman can be taxed at pleasure.[p] But taxes on freemen were absolutely necessary to defray the extraordinary charges of government. The consent of the freemen was, therefore, of necessity to be obtained. Numerous as they were, they could not assemble to give their consent in their proper persons; and for this reason, it was directed by the constitution, that they should give

[p] 1. Bac. 568.

it by their representatives, chosen by and out of themselves. Hence the indisputable and peculiar privilege of the house of commons to grant taxes. [q]

This is the source of that mild but powerful influence, which the commons of Great Britain possess over the crown. In this consists their security, that prerogative, intended for their benefit, will never be exerted for their ruin. By calmly and constitutionally refusing supplies, or by granting them only on certain conditions, they have corrected the extravagancies of some princes, and have tempered the headstrong nature of others; they have checked the progress of arbitrary power, and have supported, with honour to themselves, and with advantage to the nation, the character of grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults. Those princes, who have favoured liberty, and thrown themselves upon the affections of their people, have ever found that liberty which they favoured, and those affections which they cultivated, the firmest foundations of their throne, and the most solid support of their power. The purses of their people have been ever open to supply their exigencies: their swords have been ever ready to vindicate their honour. On the contrary, those princes, who, insensible to the glory and advantage of ruling a

q Note. It is said in divers records, "per communitatem Angliæ nobis concess." Because all grants of subsidies or aids by parliament do begin in the house of commons, and first granted by them: also because in effect the whole profit which the king reapeth, doth come from the commons. 4. Ins. 29.

free people, have preferred to a willing obedience the abject submission of slaves, have ever experienced, that all endeavours to render themselves absolute were but so many steps to their own downfall.

Such is the admirable temperament of the British constitution! such the glorious fabrick of Britain's liberty —the pride of her citizens—the envy of her neighbours—planned by her legislators—erected by her patriots —maintained entire by numerous generations past! may it be maintained entire by numerous generations to come!

Can the Americans, who are descended from British ancestors, and inherit all their rights, be blamed—can they be blamed *by their brethren in Britain*—for claiming still to enjoy those rights? But can they enjoy them, if they are bound by the acts of a British parliament? Upon what principle does the British parliament found their power? Is it founded on the prerogative of the king? His prerogative does not extend to make laws to bind any of his subjects. Does it reside in the house of lords? The peers are a collective, and not a representative body. If it resides any where, then, it must reside in the house of commons.

Should any one object here, that it does not reside in the house of commons *only*, because that house cannot make laws without the consent of the king and of the lords; the answer is easy. Though the concurrence of all the branches of the legislature is necessary to every law; yet the same laws bind different persons for different reasons, and on different principles. The king is bound, because he assented to them. The lords are

bound, because they voted for them. The representatives of the commons, for the same reason, bind themselves, and those whom they represent.

If the Americans are bound neither by the assent of the king, nor by the votes of the lords, to obey acts of the British parliament, the *sole* reason why they are bound is, because the representatives of the commons of Great Britain have given their suffrages in favour of those acts.[r] But are the representatives of the commons of Great Britain the representatives of the Americans? Are they elected by the Americans? Are they such as the Americans, if they had the power of election, would probably elect? Do they know the interest of the Americans? Does their own interest prompt them to pursue the interest of the Americans? If they do not pursue it, have the Americans power to punish them? Can the Americans remove unfaithful members at every new election? Can members, whom the Americans do not elect; with whom the Americans are not connected in interest; whom the Americans cannot remove; over whom the Americans have no influence—can such members be styled, with any propriety, the magistrates of the Americans? Have those, who are bound by the laws of magistrates not their own, any security for the enjoyment of their absolute rights—those rights, "which every man is entitled to enjoy, whether in society or out of it?"[s] Is it probable that those rights will be main-

[r] This is allowed even by the advocates for parliamentary power; who account for its extension over the colonies, upon the very absurd principle of their being *virtually* represented in the house of commons.

[s] 1. Bl. Com. 123.

tained? Is it "the primary end of government to maintain them?"[t] Shall this primary end be frustrated by a political maxim intended to promote it?

But from what source does this mighty, this uncontrolled authority of the house of commons flow? From the collective body of the commons of Great Britain. This authority must, therefore, originally reside in them: for whatever they convey to their representatives, must ultimately be in themselves.[u] And have those, whom we have hitherto been accustomed to consider as our fellow subjects, an absolute and unlimited power over us? Have they a natural right to make laws, by which we may be deprived of our properties, of our liberties, of our lives? By what title do they claim to be our masters? What act of ours has rendered us subject to those, to whom we were formerly equal? Is British freedom denominated from the *soil*, or from the *people* of Britain? If from the latter, do they lose it by quitting the soil? Do those, who embark, freemen, in Great Britain, disembark, slaves, in America? Are those, who fled from the oppression of regal and ministerial tyranny, now reduced to a state of vassalage to those, who, then, equally felt the same oppression? Whence proceeds this fatal change? Is this the return made us for leaving our friends and our country—for braving the danger of the deep—for planting a wilderness, inhabited only by savage men and savage beasts—for extending the dominions of

[t] 1. Bl. Com. 124.

[u] It is selfevident that the power, with relation to the part we bear in the legislation, is absolutely, is solely in the electors. We have no legislative authority but what we derive from them. Debates of the Commons, vol. 6. p. 75.

the British crown—for increasing the trade of the British merchants—for augmenting the rents of the British landlords—for heightening the wages of the British artificers? Britons should blush to make such a claim: Americans would blush to own it.

It is not, however, the ignominy only, but the danger also, with which we are threatened, that affects us. The many and careful provisions which are made by the British constitution, that the electors of members of parliament may be prevented from choosing representatives, who would betray them; and that the representatives may be prevented from betraying their constituents with impunity, sufficiently evince, that such precautions have been deemed absolutely necessary for securing and maintaining the system of British liberty.

How would the commons of Great Britain startle at a proposal, to deprive them of their share in the legislature, by rendering the house of commons independent of them! With what indignation would they hear it! What resentment would they feel and discover against the authors of it! Yet the commons of Great Britain would suffer less inconvenience from the execution of such a proposal, than the Americans will suffer from the extension of the legislative authority of parliament over them.

The members of parliament, their families, their friends, their posterity must be subject, as well as others, to the laws. Their interest, and that of their families, friends, and posterity, cannot be different from the interest of the rest of the nation. A regard to the former

will, therefore, direct to such measures as must promote the latter. But is this the case with respect to America? Are the legislators of Great Britain subject to the laws which are made for the colonies? Is their interest the same with that of the colonies? If we consider it in a large and comprehensive view, we shall discern it to be undoubtedly the same; but few will take the trouble to consider it in that view; and of those who do, few will be influenced by the consideration. Mankind are usually more affected with a near though inferiour interest, than with one that is superiour, but placed at a greater distance. As the conduct is regulated by the passions, it is not to be wondered at, if they secure the former, by measures which will forfeit the latter. Nay, the latter will frequently be regarded in the same manner as if it were prejudicial to them. It is with regret that I produce some late regulations of parliament as proofs of what I have advanced. We have experienced what an easy matter it is for a minister, with an ordinary share of art, to persuade the parliament and the people, that taxes laid on the colonies will ease the burthens of the mother country; which, if the matter is considered in a proper light, is, in fact, to persuade them, that the stream of national riches will be increased by closing up the fountain, from which they flow.

As the Americans cannot avail themselves of that check, which interest puts upon the members of parliament, and which would operate in favour of the commons of Great Britain, though they possessed no power over the legislature; so the love of reputation, which is a powerful incitement to the legislators to promote the welfare, and obtain the approbation, of those among whom they live, and whose praises or censures will reach and affect

them, may have a contrary operation with regard to the colonies. It may become popular and reputable at home to oppress us. A candidate may recommend himself at his election by recounting the many successful instances, in which he has sacrificed the interests of America to those of Great Britain. A member of the house of commons may plume himself upon his ingenuity in inventing schemes to serve the mother country at the expense of the colonies; and may boast of their impotent resentment against him on that account.

Let us pause here a little.—Does neither the love of gain, the love of praise, nor the love of honour influence the members of the British parliament in favour of the Americans? On what principles, then—on what motives of action, can we depend for the security of our liberties, of our properties, of every thing dear to us in life, of life itself? Shall we depend on their veneration for the dictates of natural justice? A very little share of experience in the world—a very little degree of knowledge in the history of men, will sufficiently convince us, that a regard to justice is by no means the ruling principle in human nature. He would discover himself to be a very sorry statesman, who would erect a system of jurisprudence upon that slender foundation. "He would make," as my Lord Bacon says, "imaginary laws for imaginary commonwealths; and his discourses, like the stars, would give little light, because they are so high." [v]

But this is not the worst that can justly be said concerning the situation of the colonies, if they are bound by the acts of the British legislature. So far are those

[v] 2. Ld. Bac. 537.

powerful springs of action, which we have mentioned, from interesting the members of that legislature in our favour, that, as has been already observed, we have the greatest reason to dread their operation against us. While the happy commons of Great Britain congratulate themselves upon the liberty which they enjoy, and upon the provisions—infallible, as far as they can be rendered so by human wisdom—which are made for perpetuating it to their latest posterity; the unhappy Americans have reason to bewail the dangerous situation to which they are reduced; and to look forward, with dismal apprehension, to those future scenes of woe, which, in all probability, will open upon their descendants.

What has been already advanced will suffice to show, that it is repugnant to the essential maxims of jurisprudence, to the ultimate end of all governments, to the genius of the British constitution, and to the liberty and happiness of the colonies, that they should be bound by the legislative authority of the parliament of Great Britain. Such a doctrine is not less repugnant to the voice of her laws. In order to evince this, I shall appeal to some authorities from the books of the law, which show expressly, or by a necessary implication, that the colonies are not bound by the acts of the British parliament; because they have no share in the British legislature.

The first case I shall mention was adjudged in the second year of Richard the third. It was a solemn determination of all the judges of England, met in the exchequer chamber, to consider whether the people in Ireland were bound by an act of parliament made in England. They resolved, "that they were not, as to such things as were done in Ireland; but that what they

did out of Ireland must be conformable to the laws of England, because they were the subjects of England. Ireland," said they, "has a parliament, who make laws; and our statutes do not bind them; *because they do not send knights to parliament:* but their persons are the subjects of the king, in the same manner as the inhabitants of Calais, Gascoigne, and Guienne,"[w]

This is the first case which we find in the books upon this subject; and it deserves to be examined with the most minute attention.

1. It appears, that the matter under consideration was deemed, at that time, to be of the greatest importance: for ordinary causes are never adjourned into the exchequer chamber; only such are adjourned there as are of uncommon weight, or of uncommon difficulty. "Into the exchequer chamber," says my Lord Coke,[x] "all cases of difficulty in the king's bench, or common pleas, &c. are, and of ancient time have been, adjourned, and there debated, argued, and resolved, by all the judges of England and barons of the exchequer." This court proceeds with the greatest deliberation, and upon the most mature reflection. The case is first argued on both sides by learned counsel; and then openly on several days, by all the judges. Resolutions made with so much caution, and founded on so much legal knowledge, may be relied on as the surest evidences of what is law.

2. It is to be observed, that the extent of the legislative authority of parliament is the very *point* of the

[w] 4. Mod. 225. 7. Rep. 22. b. Calvin's case. [x] 4. Ins. 110.

adjudication. The decision was not incidental or indigested: it was not a sudden opinion, unsupported by reason and argument: it was an express and deliberate resolution of that very doubt, which they assembled to resolve.

3. It is very observable, that the reason, which those reverend sages of the law gave, why the people in Ireland were not bound by an act of parliament made in England, was the same with that, on which the Americans have founded their opposition to the late statutes made concerning them. The Irish did not send members to parliament; and, therefore, they were not bound by its acts. From hence it undeniably appears, that parliamentary authority is derived *solely* from representation—that those, who are bound by acts of parliament, are bound for this only reason, because they are represented in it. If it were not the *only* reason, parliamentary authority might subsist independent of it. But as parliamentary authority fails wherever this reason does not operate, parliamentary authority can be founded on no other principle. The law never ceases, but when the reason of it ceases also.

4. It deserves to be remarked, that no exception is made of any statutes, which bind those who are not represented by the makers of them. The resolution of the judges extends to *every* statute: they say, without limitation—"our statutes do not bind them." And indeed the resolution ought to extend to every statute; because the reason, on which it is founded, extends to every one. If a person is bound only because he is represented, it must certainly follow that wherever he is not represented he is not bound. No sound argument

can be offered, why one statute should be obligatory in such circumstances, and not another. If we cannot be deprived of our property by those, whom we do not commission for that purpose; can we, without any such commission, be deprived, by them, of our lives? Have those a right to imprison and gibbet us, who have not a right to tax us?

5. From this authority it follows, that it is by no means a rule, that the authority of parliament extends to all the subjects of the crown. The inhabitants of Ireland were the subjects of the king as of his crown of England; but it is expressly resolved, in the most solemn manner, that the inhabitants of Ireland are not bound by the statutes of England. Allegiance to the king and obedience to the parliament are founded on very different principles. The former is founded on protection: the latter, on representation. An inattention to this difference has produced, I apprehend, much uncertainty and confusion in our ideas concerning the connexion, which ought to subsist between Great Britain and the American colonies.

6. The last observation which I shall make on this case is, that if the inhabitants of Ireland are not bound by acts of parliament made in England, *a fortiori*, the inhabitants of the American colonies are not bound by them. There are marks of the subordination of Ireland to Great Britain, which cannot be traced in the colonies. A writ of errour lies from the king's bench in Ireland, [y] to the king's bench, and consequently to the house of lords, in England; by which means the former kingdom

[y] 4 Ins. 356.

is subject to the control of the courts of justice of the latter kingdom. But a writ of errour does not lie in the king's bench, nor before the house of lords, in England, from the colonies of America. The proceedings in their courts of justice can be reviewed and controlled only on an appeal to the king in council.[z]

The foregoing important decision, favourable to the liberty of all the dominions of the British crown that are not represented in the British Parliament, has been corroborated by subsequent adjudications. I shall mention one that was given in the king's bench, in the fifth year of King William and Queen Mary, between Blankard and Galdy.[a]

The plaintiff was provost marshal of Jamaica, and by articles, granted a deputation of that office to the defendant, under a yearly rent. The defendant gave his bond for the performance of the agreement; and an action of debt was brought upon that bond. In bar of the action, the defendant pleaded the statute of 5. Ed. 6. made against buying and selling of offices that concern the administration of justice, and averred that this office concerned the administration of justice in Jamaica, and that, by virtue of that statute, both the bond and articles were void. To this plea the plaintiff replied, that Jamaica was an island inhabited formerly by the Spaniards, "that it was conquered by the subjects of the kingdom of England, commissioned by legal and sufficient authority for that purpose; and that since that conquest its inhabitants were regulated and governed by their own proper laws and statutes, and not by acts of parliament or the statutes of the kingdom of England." The defendant, in

[z] 1. Bl. Com. 108. 231. [a] 4. Mod. 215. Salk. 411.

his rejoinder, admits that, before the conquest of Jamaica by the English, the inhabitants were governed by their own laws, but alleges that "since the conquest it was part of the kingdom of England, and governed by the laws and statutes of the kingdom of England, and not by laws and statutes peculiar to the island." To this rejoinder the plaintiff demurred, and the defendant joined in demurrer.

Here was a cause to be determined judicially upon this single question in law—Were the acts of parliament or statutes of England in force in Jamaica? It was argued on the opposite sides by lawyers of the greatest eminence, before Lord Chief Justice Holt (a name renowned in the law) and his brethren, the justices of the king's bench. They unanimously gave judgment for the plaintiff; and, by that judgment, expressly determined—That the acts of parliament or statutes of England were not in force in Jamaica. This decision is explicit in favour of America; for whatever was resolved concerning Jamaica is equally applicable to every American colony.

Some years after the adjudication of this case, another was determined in the king's bench, relating to Virginia; in which Lord Chief Justice Holt held, that the laws of England did not extend to Virginia. [b]

I must not be so uncandid as to conceal, that in Calvin's case, where the above mentioned decision of the judges in the exchequer chamber, concerning Ireland, is quoted, it is added, by way of explanation of that authority,—"which is to be understood, unless it (Ire-

[b] Salk. 666.

land) be especially named." Nor will I conceal that the same exception [c] is taken notice of, and seems to be allowed, by the judges in the other cases relating to America. To any objection that may, hence, be formed against my doctrine, I answer, in the words of the very accurate Mr. Justice Foster, that "general rules thrown out in argument, and carried farther than the true state of the case then in judgment requireth, have, I confess, no great weight with me." [d]

The question before the judges in the cases I have reasoned from, was not how far the naming of persons in an act of parliament would affect them; though, unless named, they would not be bound by it: the question was, whether the legislative authority of parliament extended over the inhabitants of Ireland or Jamaica or Virginia. To the resolution of the latter question the resolution of the former was by no means necessary, and was, therefore, wholly impertinent to the point of the adjudication.

But farther, the reason assigned for the resolution of the latter question is solid and convincing: the American colonies are not bound by the acts of the British parliament, because they are not represented in it. But what reason can be assigned why they should be bound by those acts, in which they are specially named? Does naming them give those, who do them that honour, a right to rule over them? Is this the source of the supreme,

c This exception does not seem to be taken in the case of 2d. Richard III. which was the foundation of all the subsequent cases.

d Fost. 313.

the absolute, the irresistible, the uncontrolled authority of parliament? These positions are too absurd to be alleged; and a thousand judicial determinations in their favour would never induce one man of sense to subscribe his assent to them.[e]

The obligatory force of the British statutes upon the colonies, when named in them, must be accounted for, by the advocates of that power, upon some other principle. In my Lord Coke's Reports, it is said, "that albeit Ireland be a distinct dominion, yet, *the title thereof being by conquest*, the same, by judgment of law, may be, by express words, bound by the parliaments of England." In this instance, the obligatory authority of the parliament is plainly referred to a title by conquest, as its foundation and original. In the instances relating to the colonies, this authority seems

e Where a decision is manifestly absurd and unjust, such a sentence is not law. 1. Bl Com. 70.

The legality of the opinion "that the people in Ireland were bound by the statutes of England, when particularly named by them," seems afterwards to have been doubted of by Lord Coke himself, in another place of his works. After having mentioned the resolution in the exchequer chamber in the time of Richard the third, and having taken notice that question is made of it in some of the books, and particularly in Calvin's case, he says, "that the question concerning the binding force of English statutes over Ireland is now by common experience and opinion without any scruple resolved; that the acts of parliament made in England, since the act of the 10th H. 7. (he makes no exceptions) do not bind them in Ireland; but all acts made in England before 10. H. 7. *by the said act made in Ireland An.* 10. *H.* 7. *c.* 22, do bind them in Ireland." 12. Rep. 111.

to be referred to the same source: for any one, who compares what is said of Ireland, and other conquered countries, in Calvin's case, with what is said of America, in the adjudications concerning it, will find that the judges, in determining the latter, have grounded their opinions on the resolutions given in the former.[f] It is foreign to my purpose to inquire into the reasonableness of founding the authority of the British parliament over Ireland, upon the title of conquest, though I believe it would be somewhat difficult to deduce it satisfactorily in this manner. It will be sufficient for me to show, that it is unreasonable, and injurious to the colonies, to extend that title to them. How came the colonists to be a conquered people? By whom was the conquest over them obtained? By the house of commons? By the constituents of that house? If the idea of conquest must be taken into consideration when we examine into the title by which America is held, that idea, so far as it

[f] It is plain that Blackstone understood the opinion of the judges —that the colonies are bound by acts of the British parliament, if named in them—to be founded on the principle of conquest. It will not be improper to insert his commentary upon the resolutions respecting America. "Besides these adjacent islands, (Jersey, &c.) our more distant plantations in America and elsewhere are also, in some respects, subject to the English laws. Plantations, or colonies in distant countries, are either such where the lands are claimed in right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. Our American plantations are principally of this latter sort; being obtained in the last century, either *by right of conquest*, and driving out the natives (with what natural justice I shall not at present inquire) or by treaties." 1. Bl. Com. 106. 107.

Lord Chief Justice Holt, in a case above cited, calls Virginia a conquered country. Salk. 666.

can operate, will operate in favour of the colonists, and not against them. Permitted and commissioned by the crown, they undertook, at their own expense, expeditions to this distant country, took possession of it, planted it, and cultivated it. Secure under the protection of their king, they grew and multiplied, and diffused British freedom and British spirit, wherever they came. Happy in the enjoyment of liberty, and in reaping the fruits of their toils; but still more happy in the joyful prospect of transmitting their liberty and their fortunes to the latest posterity, they inculcated to their children the warmest sentiments of loyalty to their sovereign, under whose auspices they enjoyed so many blessings, and of affection and esteem for the inhabitants of the mother country, with whom they gloried in being intimately connected. Lessons of loyalty to parliament, indeed, they never gave: they never suspected that such unheard of loyalty would be required. They never suspected that their descendants would be considered and treated as a conquered people; and therefore they never taught them the submission and abject behaviour suited to that character.

I am sufficiently aware of an objection, that will be made to what I have said concerning the legislative authority of the British parliament. It will be alleged, that I throw off all dependence on Great Britain. This objection will be held forth, in its most specious colours, by those, who, from servility of soul, or from mercenary considerations, would meanly bow their necks to every exertion of arbitrary power: it may likewise alarm some, who entertain the most favourable opinion of the connexion between Great Britain and her colonies; but who are not sufficiently acquainted with the nature of that connexion, which is so dear to them. Those of the first class, I hope,

are few; I am sure they are contemptible, and deserve to have very little regard paid to them: but for the sake of those of the second class, who may be more numerous, and whose laudable principles atone for their mistakes, I shall take some pains to obviate the objection, and to show that a denial of the legislative authority of the British parliament over America is by no means inconsistent with that connexion, which ought to subsist between the mother country and her colonies, and which, at the first settlement of those colonies, it was intended to maintain between them: but that, on the contrary, that connexion would be entirely destroyed by the extension of the power of parliament over the American plantations.

Let us examine what is meant by a *dependence* on Great Britain: for it is always of importance clearly to define the terms that we use. Blackstone, who, speaking of the colonies, tells us, that "they are no part of the mother "country, but distinct (though dependent) dominions,"[g] explains dependence in this manner. "Dependence is "very little else, but an obligation to conform to the will "or law of that superiour person or state, upon which the "inferiour depends. The original and true ground of this "superiority, in the case of Ireland, is what we usually "call, though somewhat improperly, the right of con-"quest; a right allowed by the law of nations, if not by "that of nature; but which, in reason and civil policy, "can mean nothing more, than that, in order to put an end "to hostilities, a compact is either expressly or tacitly "made between the conqueror and the conquered, that if "they will acknowledge the victor for their master, he "will treat them for the future as subjects, and not as "enemies."[h]

[g] 1. Bl. Com. 107. [h] Id. 103.

The original and true ground of the superiority of Great Britain over the American colonies is not shown in any book of the law, unless, as I have already observed, it be derived from the right of conquest. But I have proved, and I hope satisfactorily, that this right is altogether inapplicable to the colonists. The original of the superiority of Great Britain over the colonies is, then, unaccounted for; and when we consider the ingenuity and pains which have lately been employed at home on this subject, we may justly conclude, that the only reason why it is not accounted for, is, that it cannot be accounted for. The superiority of Great Britain over the colonies ought, therefore, to be rejected; and the dependence of the colonies upon her, if it is to be construed into "an obligation to conform to the will or law of the superiour state," ought, in *this* sense, to be rejected also.

My sentiments concerning this matter are not singular. They coincide with the declarations and remonstrances of the colonies against the statutes imposing taxes on them. It was their unanimous opinion, that the parliament have no right to exact obedience to those statutes; and, consequently, that the colonies are under no obligation to obey them. The dependence of the colonies on Great Britain was denied, in those instances; but a denial of it in those instances is, in effect, a denial of it in all other instances. For, if dependence is an obligation to conform to the will or law of the superiour state, any exceptions to that obligation must destroy the dependence. If, therefore, by a dependence of the colonies on Great Britain, it is meant, that they are obliged to obey the laws of Great Britain, reason, as well as the unanimous voice of the Americans, teaches us to disown it. Such a dependence was never thought of by those who left Britain, in

order to settle in America; nor by their sovereigns, who gave them commissions for that purpose. Such an obligation has no correspondent right: for the commons of Great Britain have no dominion over their equals and fellow subjects in America: they can confer no right to their delegates to bind those equals and fellow subjects by laws.

There is another, and a much more reasonable meaning, which may be intended by the dependence of the colonies on Great Britain. The phrase may be used to denote the obedience and loyalty, which the colonists owe to the *kings* of Great Britain. If it should be alleged, that this cannot be the meaning of the expression, because it is applied to the kingdom, and not to the king, I give the same answer that my Lord Bacon gave to those who said that allegiance related to the kingdom and not to the king; because in the statutes there are these words—"born within the allegiance of England"—and again—"born without the allegiance of England." "There is no trope of speech more familiar," says he, "than to use the place of addition for the person. So we say commonly, the line of York, or the line of Lancaster, for the lines of the duke of York, or the duke of Lancaster. So we say the possessions of Somerset or Warwick, intending the possessions of the dukes of Somerset, or earls of Warwick. And in the very same manner, the statute speaks, allegiance of England, for allegiance of the king of England."[i]

Dependence on the mother country seems to have been understood in this sense, both by the first planters

[i] 4. Ld. Bac. 192. 193. Case of the postnati of Scotland.

of the colonies, and also by the most eminent lawyers, at that time, in England.

Those who launched into the unknown deep, in quest of new countries and habitations, still considered themselves as subjects of the English monarchs, and behaved suitably to that character; but it no where appears, that they still considered themselves as represented in an English parliament, or that they thought the authority of the English parliament extended over them. They took possession of the country in the *king's* name: they treated, or made war with the Indians by *his* authority: they held the lands under *his* grants, and paid *him* the rents reserved upon them: they established governments under the sanction of *his* prerogative, or by virtue of *his* charters:—no application for those purposes was made to the parliament: no ratification of the charters or letters patent was solicited from that assembly, as is usual in England with regard to grants and franchises of much less importance.

My Lord Bacon's sentiments on this subject ought to have great weight with us. His immense genius, his universal learning, his deep insight into the laws and constitution of England, are well known and much admired. Besides, he lived at that time when settling and improving the American plantations began seriously to be attended to, and successfully to be carried into execution.[j] Plans for the government and regulation of the colonies were then forming: and it is only from the first general idea of

j During the reign of Queen Elizabeth, America was chiefly valued on account of its mines. It was not till the reign of James 1. that any vigorous attempts were made to clear and improve the soil.

these plans, that we can unfold, with precision and accuracy, all the more minute and intricate parts, of which they now consist. "The settlement of colonies," says he, "must proceed from the option of those who will settle them, else it sounds like an exile: they must be raised by the *leave*, and not by the *command* of the *king*. At their setting out, they must have their commission, or letters patent, from the *king*, that so they may acknowledge their *dependency upon the crown* of England, and under his protection." In another place he says, "that they still must be subjects of the realm."[k] "In order to regulate all the inconveniences, which will insensibly grow upon them," he proposes, "that the king should erect a subordinate council in England, whose care and charge shall be, to advise, and put in execution, all things which shall be found fit for the good of those new plantations; who, upon all occasions, shall give an account of their proceedings to the king or the council board, and from *them* receive such directions, as may best agree with the government of that place."[l] It is evident, from these quotations, that my Lord Bacon had no conception that the parliament would or ought to interpose,[m] either in the settlement or the government of the colonies. The only relation, in which he says the colonists must still continue, is that of subjects: the only depen-

[k] The parliament have no subjects. My Lord Bacon gives, in this expression, an instance of the trope of speech before mentioned. He says, the subjects of the *realm*, when he means the subjects of the *king* of the realm.

[l] 1. Ld. Bac. 725, 726.

[m] It was chiefly during the confusions of the republick, when the king was in exile, and unable to assert his rights, that the house of commons began to interfere in colony matters.

dency, which they ought to acknowledge, is a dependency on the crown.

This is a dependence, which they have acknowledged hitherto; which they acknowledge now; and which, if it is reasonable to judge of the future by the past and the present, they will continue to acknowledge hereafter. It is not a dependence, like that contended for on parliament, slavish and unaccountable, or accounted for only by principles that are false and inapplicable: it is a dependence founded upon the principles of reason, of liberty, and of law. Let us investigate its sources.

The colonists ought to be dependent on the king, because they have hitherto enjoyed, and still continue to enjoy, his protection. Allegiance is the faith and obedience, which every subject owes to his prince. This obedience is founded on the protection derived from government: for protection and allegiance are the reciprocal bonds, which connect the prince and his subjects.[n] Every subject, so soon as he is born, is under the royal protection, and is entitled to all the advantages arising from it. He therefore owes obedience to that royal power, from which the protection, which he enjoys, is derived. But while he continues in infancy and non-age, he cannot perform the duties which his allegiance requires. The performance of them must be respited till he arrive at the years of discretion and maturity. When

[n] Between the sovereign and subject there is duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam; ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen. 7. Rep. 5a. Calvin's case.

he arrives at those years, he owes obedience, not only for the protection which he now enjoys, but also for that which, from his birth, he has enjoyed; and to which his tender age has hitherto prevented him from making a suitable return. Allegiance now becomes a duty founded upon principles of gratitude, as well as on principles of interest: it becomes a debt, which nothing but the loyalty of a whole life will discharge. [o] As neither climate, nor soil, nor time entitle a person to the benefits of a subject; so an alteration of climate, of soil, or of time cannot release him from the duties of one. An Englishman, who removes to foreign countries, however distant from England, owes the same allegiance to his king there which he owed him at home; and will owe it twenty years hence as much as he owes it now. Wherever he is, he is still liable to the punishment annexed by law to crimes against his allegiance; and still entitled to the advantages promised by law to the duties of it: it is not cancelled; and it is not forfeited. "Hence all children born in any "part of the world, if they be of English parents con- "tinuing at that time as liege subjects to the king, and "having done no act to forfeit the benefit of their alle- "giance, are *ipso facto* naturalized: and if they have "issue, and their descendants intermarry among them- "selves, such descendants are naturalized to all genera- "tions." [p]

[o] The king is protector of all his subjects: in virtue of his high trust, he is more particularly to take care of these who are not able to take care of themselves, consequently of infants, who, by reason of their nonage, are under incapacities; from hence natural allegiance arises, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince. 2. P. Wms. 123. 124.

[p] 4. Ld. Bac. 192. Case of the postnati of Scotland.

Thus we see, that the subjects of the king, though they reside in foreign countries, still owe the duties of allegiance, and are still entitled to the advantages of it. They transmit to their posterity the privilege of naturalization, and all the other privileges which are the consequences of it.[q]

Now we have explained the dependence of the Americans. They are the subjects of the king of Great Britain. They owe him allegiance. They have a right to the benefits which arise from preserving that allegiance inviolate. They are liable to the punishments which await those who break it. This is a dependence, which they have always boasted of. The principles of loyalty are deeply rooted in their hearts; and there they will grow and bring forth fruit, while a drop of vital blood remains to nourish them. Their history is not stained with rebellious and treasonable machinations: an inviolable attachment to their sovereign, and the warmest zeal for his glory, shine in every page.

From this dependence, abstracted from every other source, arises a strict connexion between the inhabitants of Great Britain and those of America. They are fellow subjects; they are under allegiance to the same prince; and this union of allegiance naturally produces a union of hearts. It is also productive of a union of measures through the whole British dominions. To the

[q] Natural born subjects have a great variety of rights, which they acquire by being born in the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour; the explanation of which rights is the principal subject of the law. 1. Bl. Com. 371.

king is intrusted the direction and management of the great machine of government. He therefore is fittest to adjust the different wheels, and to regulate their motions in such a manner as to cooperate in the same general designs. He makes war: he concludes peace: he forms alliances: he regulates domestick trade by his prerogative, and directs foreign commerce by his treaties with those nations, with whom it is carried on. He names the officers of government; so that he can check every jarring movement in the administration. He has a negative on the different legislatures throughout his dominions, so that he can prevent any repugnancy in their different laws.

The connexion and harmony between Great Britain and us, which it is her interest and ours mutually to cultivate, and on which her prosperity, as well as ours, so materially depends, will be better preserved by the operation of the legal prerogatives of the crown, than by the exertion of an unlimited authority by parliament. [r]

[r] After considering, with all the attention of which I am capable, the foregoing opinion— that all the different members of the British empire are distinct states, independent of each other, but connected together under the same sovereign in right of the same crown—I discover only one objection that can be offered against it. But this objection will, by many, be deemed a fatal one. "How, it will be urged, can the trade of the British empire be carried on, without some power, extending over the whole, to regulate it? The legislative authority of each part, according to your doctrine, is confined within the local bounds of that part: how, then, can so many interfering interests and claims, as must necessarily meet and contend in the commerce of the whole, be decided and adjusted?"

Permit me to answer these questions by proposing some others in my turn. How has the trade of Europe—how has the trade of

the whole globe, been carried on? Have those widely extended plans been formed by one superintending power? Have they been carried into execution by one superintending power? Have they been formed—have they been carried into execution, with less conformity to the rules of justice and equality, than if they had been under the direction of one superintending power?

It has been the opinion of some politicians, of no inferiour note, that all regulations of trade are useless; that the greatest part of them are hurtful; and that the stream of commerce never flows with so much beauty and advantage, as when it is not diverted from its natural channels. Whether this opinion is well founded or not, let others determine. Thus much may certainly be said, that commerce is not so properly the object of laws, as of treaties and compacts. In this manner, it has been always directed among the several nations of Europe.

But if the commerce of the British empire must be regulated by a general superintending power, capable of exerting its influence over every part of it, why may not this power be intrusted to the king, as a part of the royal prerogative? By making treaties, which it is his prerogative to make, he directs the trade of Great Britain with the other states of Europe: and his treaties with those states have, when considered with regard to his subjects, all the binding force of laws upon them. (1. Bl. Com. 252.) Where is the absurdity in supposing him vested with the same right to regulate the commerce of the distinct parts of his dominions with one another, which he has to regulate their commerce with foreign states? If the history of the British constitution, relating to this subject, be carefully traced, I apprehend we shall discover, that a prerogative in the crown, to regulate trade, is perfectly consistent with the principles of law. We find many authorities that the king cannot lay impositions on traffick; and that he cannot restrain it *altogether*, nor confine it to monopolists: but none of the authorities, that I have had an opportunity of consulting, go any farther. Indeed many of them seem to imply a power in the crown to regulate trade, where that power is exerted for the great end of all prerogative—the publick good.

If the power of regulating trade be, as I am apt to believe it to be, vested, by the principles of the constitution, in the crown, this good effect will flow from the doctrine: a perpetual distinction will be kept up between that power, and a power of laying impositions on trade. The prerogative will extend to the former: it can, under no pretence, extend to the latter: as it is given, so it is limited, by the law.

# SPEECH

DELIVERED IN THE

# CONVENTION FOR THE PROVINCE

OF

# PENNSYLVANIA,

# HELD AT PHILADELPHIA,

IN JANUARY, 1775.

# SPEECH

## IN CONVENTION,

### IN JANUARY, 1775.

WHENCE, Sir, proceeds all the invidious and ill-grounded clamour against the colonists of America? Why are they stigmatized, in Britain, as licentious and ungovernable? Why is their virtuous opposition to the illegal attempts of their governours represented under the falsest colours, and placed in the most ungracious point of view? This opposition, when exhibited in its true light, and when viewed, with unjaundiced eyes, from a proper situation, and at a proper distance, stands confessed the lovely offspring of freedom. It breathes the spirit of its parent. Of this ethereal spirit, the whole conduct, and particularly the late conduct, of the colonists has shown them eminently possessed. It has animated and regulated every part of their proceedings. It has been recognised to be genuine, by all those symptoms and

effects, by which it has been distinguished in other ages and other countries. It has been calm and regular: it has not acted without occasion: it has not acted disproportionably to the occasion. As the attempts, open or secret, to undermine or to destroy it, have been repeated or enforced; in a just degree, its vigilance and its vigour have been exerted to defeat or to disappoint them. As its exertions have been sufficient for those purposes hitherto, let us hence draw a joyful prognostick, that they will continue sufficient for those purposes hereafter. It is not yet exhausted; it will still operate irresistibly whenever a necessary occasion shall call forth its strength.

Permit me, sir, by appealing, in a few instances, to the spirit and conduct of the colonists, to evince, that what I have said of them is just. Did they disclose any uneasiness at the proceedings and claims of the British parliament, before those claims and proceedings afforded a reasonable cause for it? Did they even disclose any uneasiness, when a reasonable cause for it was *first* given? Our rights were invaded by their regulations of our internal policy. We submitted to them: we were unwilling to oppose them. The spirit of liberty was slow to act. When those invasions were renewed; when the efficacy and malignancy of them were attempted to be redoubled by the stamp act; when chains were formed for us; and preparations were made for rivetting them on our limbs—what measures did we pursue? The spirit of liberty found it necessary now to act: but she acted with the calmness and decent dignity suited to her character. Were we rash or seditious? Did we discover want of loyalty to our sovereign? Did we betray want of affection to our brethren in Britain? Let our dutiful and reverential petitions to the throne—let our

respectful, though firm, remonstrances to the parliament —let our warm and affectionate addresses to our brethren, and (we will still call them) our friends in Great Britain —let all those, transmitted from every part of the continent, testify the truth. By their testimony let our conduct be tried.

As our proceedings during the existence and operation of the stamp act prove fully and incontestably the painful sensations that tortured our breasts from the prospect of disunion with Britain; the peals of joy, which burst forth universally, upon the repeal of that ódious statute, loudly proclaim the heartfelt delight produced in us by a reconciliation with her. Unsuspicious, because undesigning, we buried our complaints, and the causes of them, in oblivion, and returned, with eagerness, to our former unreserved confidence. Our connexion with our parent country, and the reciprocal blessings resulting from it to her and to us, were the favourite and pleasing topicks of our publick discourses and our private conversations. Lulled into delightful security, we dreamt of nothing but increasing fondness and friendship, cemented and strengthened by a kind and perpetual communication of good offices. Soon, however, too soon, were we awakened from the soothing dreams! Our enemies renewed their designs against us, not with less malice, but with more art. Under the plausible pretence of regulating our trade, and, at the same time, of making provision for the administration of justice, and the support of government, in some of the colonies, they pursued their scheme of depriving us of our property without our consent. As the attempts to distress us, and to degrade us to a rank inferiour to that of freemen, appeared now to be reduced into a regular system, it

became proper, on our part, to form a regular system for counteracting them. We ceased to import goods from Great Britain. Was this measure dictated by selfishness or by licentiousness? Did it not injure ourselves, while it injured the British merchants and manufacturers? Was it inconsistent with the peaceful demeanour of subjects to abstain from making purchases, when our freedom and our safety rendered it necessary for us to abstain from them? A regard for our freedom and our safety was our only motive; for no sooner had the parliament, by repealing part of the revenue laws, inspired us with the flattering hopes that they had departed from their intentions of oppressing and of taxing us, than we forsook our plan for defeating those intentions, and began to import as formerly. Far from being peevish or captious, we took no publick notice even of their declaratory law of dominion over us: our candour led us to consider it as a decent expedient of retreating from the actual exercise of that dominion.

But, alas! the root of bitterness still remained. The duty on tea was reserved to furnish occasion to the ministry for a new effort to enslave and to ruin us; and the East India Company were chosen, and consented, to be the detested instruments of ministerial despotism and cruelty. A cargo of their tea arrived at Boston. By a low artifice of the governour, and by the wicked activity of the tools of government, it was rendered impossible to store it up, or to send it back; as was done at other places. A number of persons unknown destroyed it.

Let us here make a concession to our enemies: let us suppose that the transaction deserves all the dark and hideous colours, in which they have painted it: let us even

suppose—for our cause admits of an excess of candour—that all their exaggerated accounts of it were confined strictly to the truth: what will follow? Will it follow, that every British colony in America, or even the colony of Massachussetts Bay, or even the town of Boston in that colony, merits the imputation of being factious and seditious? Let the frequent mobs and riots that have happened in Great Britain upon much more trivial occasions shame our calumniators into silence. Will it follow, because the rules of order and regular government were, in that instance, violated by the offenders, that, for this reason, the principles of the constitution, and the maxims of justice, must be violated by their punishment? Will it follow, because those who were guilty could not be known, that, therefore, those who were known not to be guilty must suffer? Will it follow, that even the guilty should be condemned without being heard?—That they should be condemned upon partial testimony, upon the representations of their avowed and embittered enemies? Why were they not tried in courts of justice known to their constitution, and by juries of their neighbourhood? Their courts and their juries were not, in the case of Captain Preston, transported beyond the bounds of justice by their resentment: why, then, should it be presumed, that, in the case of those offenders, they would be prevented from doing justice by their affection? But the colonists, it seems, must be stript of their judicial, as well as of their legislative powers. They must be bound by a legislature, they must be tried by a jurisdiction, not their own. Their constitutions must be changed: their liberties must be abridged: and those, who shall be most infamously active in changing their constitutions and abridging their liberties, must, by an express provision, be exempted from punishment.

I do not exaggerate the matter, sir, when I extend these observations to all the colonists. The parliament meant to extend the effects of their proceedings to all the colonists. The plan, on which their proceedings are formed, extends to them all. From an incident, of no very uncommon or atrocious nature, which happened in one colony, in one town in that colony, and in which only a few of the inhabitants of that town took a part, an occasion has been taken by those, who probably intended it, and who certainly prepared the way for it, to impose upon that colony, and to lay a foundation and a precedent for imposing upon all the rest, a system of statutes, arbitrary, unconstitutional, oppressive, in every view and in every degree subversive of the rights, and inconsistent with even the name of freemen.

Were the colonists so blind as not to discern the consequences of these measures? Were they so supinely inactive as to take no steps for guarding against them? They were not. They ought not to have been so. We saw a breach made in those barriers, which our ancestors, British and American, with so much care, with so much danger, with so much treasure, and with so much blood, had erected, cemented, and established for the security of their liberties and—with filial piety let us mention it—of ours: we saw the attack actually begun upon one part: ought we to have folded our hands in indolence, to have lulled our eyes in slumbers, till the attack was carried on, so as to become irresistible, in every part? Sir, I presume to think not. We were roused; we were alarmed, as we had reason to be. But still our measures have been such as the spirit of liberty and of loyalty directed; not such as a spirit of sedition or of disaffection would pursue. Our counsels have been conducted without rashness and

faction: our resolutions have been taken without phrensy or fury.

That the sentiments of every individual concerning that important object, his liberty, might be known and regarded, meetings have been held, and deliberations carried on in every particular district. That the sentiments of all those individuals might gradually and regularly be collected into a single point, and the conduct of each inspired and directed by the result of the whole united, county committees—provincial conventions—a continental congress have been appointed, have met and resolved. By this means, a chain—more inestimable, and, while the necessity for it continues, we hope, more indissoluble than one of gold—a chain of freedom has been formed, of which every individual in these colonies, who is willing to preserve the greatest of human blessings, his liberty, has the pleasure of beholding himself a link.

Are these measures, sir, the brats of disloyalty, of disaffection? There are miscreants among us—wasps that suck poison from the most salubrious flowers—who tell us they are. They tell us that all those assemblies are unlawful, and unauthorized by our constitutions; and that all their deliberations and resolutions are so many transgressions of the duty of subjects. The utmost malice brooding over the utmost baseness, and nothing but such a hated commixture, must have hatched this calumny. Do not those men know—would they have others not to know—that it was impossible for the inhabitants of the same province, and for the legislatures of the different provinces, to communicate their sentiments to one another in the modes appointed for such purposes, by their different constitutions? Do not they know—would they

have others not to know—that all this was rendered impossible by those very persons, who now, or whose minions now, urge this objection against us? Do not they know—would they have others not to know—that the different assemblies, who could be dissolved by the governours, were, in consequence of ministerial mandates, dissolved by them, whenever they attempted to turn their attention to the greatest objects, which, as guardians of the liberty of their constituents, could be presented to their view? The arch enemy of the human race torments them only for those actions, to which he has tempted, but to which he has not necessarily obliged them. Those men refine even upon infernal malice: they accuse, they thr aten us (superlative impudence!) for taking those very steps, which we were laid under the disagreeable necessity of taking by themselves, or by those in whose hateful service they are enlisted. But let them know, that our counsels, our deliberations, our resolutions, if not authorized by the forms, because that was rendered impossible by our enemies, are nevertheless authorized by that which weighs much more in the scale of reason—by the spirit of our constitutions. Was the convention of the barons at Running Meade, where the tyranny of John was checked, and magna charta was signed, authorized by the forms of the constitution? Was the convention parliament, that recalled Charles the second, and restored the monarchy, authorized by the forms of the constitution? Was the convention of lords and commons, that placed King William on the throne, and secured the monarchy and liberty likewise, authorized by the forms of the constitution? I cannot conceal my emotions of pleasure, when I observe, that the objections of our adversaries cannot be urged against us, but in common with those venerable assemblies, whose proceedings formed such an accession to British liberty and British renown.

The resolutions entered into, and the recommendations given, by the continental congress, have stamped, in the plainest characters, the genuine and enlightened spirit of liberty upon the conduct observed, and the measures pursued, in consequence of them. As the invasions of our rights have become more and more formidable, our opposition to them has increased in firmness and vigour, in a just, and in no more than a just, proportion. We will not import goods from Great Britain or Ireland: in a little time we will suspend our exportations to them: and, if the same illiberal and destructive system of policy be still carried on against us, in a little time more we will not consume their manufactures. In that colony where the attacks have been most open, immediate, and direct, some farther steps have been taken, and those steps have met with the deserved approbation of the other provinces.

Is this scheme of conduct allied to rebellion? Can any symptoms of disloyalty to his majesty, of disinclination to his illustrious family, or of disregard to his authority be traced in it? Those, who would blend, and whose crimes have made it necessary for them to blend, the tyrannick acts of administration with the lawful measures of government, and to veil every flagitious procedure of the ministry under the venerable mantle of majesty, pretend to discover, and employ their emissaries to publish the pretended discovery of such symptoms. We are not, however, to be imposed upon by such shallow artifices. We know, that we have not violated the laws or the constitution; and that, therefore, we are safe as long as the laws retain their force and the constitution its vigour; and that, whatever our demeanour be, we

cannot be safe much longer. But another object demands our attention.

We behold—sir, with the deepest anguish we behold —that our opposition has not been as effectual as it has been constitutional. The hearts of our oppressors have not relented: our complaints have not been heard: our grievances have not been redressed: our rights are still invaded: and have we no cause to dread, that the invasions of them will be enforced in a manner, against which all reason and argument, and all opposition of every peaceful kind, will be vain? Our opposition has hitherto increased with our oppression: shall it, in the most desperate of all contingencies, observe the same proportion?

Let us pause, sir, before we give an answer to this question: the fate of us; the fate of millions now alive; the fate of millions yet unborn depends upon the answer. Let it be the result of calmness and of intrepidity: let it be dictated by the principles of loyalty, and the principles of liberty. Let it be such, as never, in the worst events, to give us reason to reproach ourselves, or others reason to reproach us for having done too much or too little.

Perhaps the following resolution may be found not altogether unbefitting our present situation. With the greatest deference I submit it to the mature consideration of this assembly.

"That the act of the British parliament for altering the charter and constitution of the colony of Massachussetts Bay, and those "for the impartial administration of jus-

tace" in that colony, for shutting the port of Boston, and for quartering soldiers on the inhabitants of the colonies, are unconstitutional and void; and can confer no authority upon those who act under colour of them. That the crown cannot, by its prerogative, alter the charter or constitution of that colony: that all attempts to alter the said charter or constitution, unless by the authority of the legislature of that colony, are manifest violations of the rights of that colony, and illegal: that all force employed to carry such unjust and illegal attempts into execution is force without authority: that it is the right of British subjects to resist such force: that this right is founded both upon the letter and the spirit of the British constitution."

To prove, at this time, that those acts are unconstitutional and void is, I apprehend, altogether unnecessary. The doctrine has been proved fully, on other occasions, and has received the concurring assent of British America. It rests upon plain and indubitable truths. We do not send members to the British parliament: we have parliaments (it is immaterial what name they go by) of our own.

That a void act can confer no authority upon those, who proceed under colour of it, is a selfevident proposition.

Before I proceed to the other clauses, I think it useful to recur to some of the fundamental maxims of the British constitution; upon which, as upon a rock, our wise ancestors erected that stable fabrick, against which the gates of hell have not hitherto prevailed. Those maxims I shall apply fairly, and, I flatter myself, satis-

factorily to evince every particular contained in the resolution.

The government of Britain, sir, was never an arbitrary government: our ancestors were never inconsiderate enough to trust those rights, which God and nature had given them, unreservedly into the hands of their princes. However difficult it may be, in other states, to prove an original contract subsisting in any other manner, and on any other conditions, than are naturally and necessarily implied in the very idea of the first institution of a state; it is the easiest thing imaginable, since the revolution of 1688, to prove it in our constitution, and to ascertain some of the material articles, of which it consists. It has been often appealed to: it has been often broken, at least on one part: it has been often renewed: it has been often confirmed: it still subsists in its full force: "it binds the king as much as the meanest subject."[a] The measures of his power, and the limits, beyond which he cannot extend it, are circumscribed and regulated by the same authority, and with the same precision, as the measures of the subject's obedience, and the limits, beyond which he is under no obligation to practise it, are fixed and ascertained. Liberty is, by the constitution, of equal stability, of equal antiquity, and of equal authority with prerogative. The duties of the king and those of the subject are plainly reciprocal: they can be violated on neither side, unless they be performed on the other.[b] The law

a Bol. Pat. King. 122.

b Bol. Tracts. 293. The compact between the king and people is mutual, and the parties are mutually bound. 11. Parl. Deb. 435. (Ld. Chesterfield.)

is the common standard, by which the excesses of prerogative as well as the excesses of liberty are to be regulated and reformed.

Of this great compact between the king and his people, one essential article to be performed on his part is—that, in those cases where provision is expressly made and limitations set by the laws, his government shall be conducted according to those provisions, and restrained according to those limitations—that, in those cases, which are not expressly provided for by the laws, it shall be conducted by the best rules of discretion, agreeably to the general spirit of the laws, and subserviently to their ultimate end—the interest and happiness of his subjects—that, in no case, it shall be conducted contrary to the express, or to the implied principles of the constitution.

These general maxims, which we may justly consider as fundamentals of our government, will, by a plain and obvious application of them to the parts of the resolution remaining to be proved, demonstrate them to be strictly agreeable to the laws and constitution.

We can be at no loss in resolving, that the king cannot, by his prerogative, alter the charter or constitution of the colony of Massachussetts Bay. Upon what principle could such an exertion of prerogative be justified? On the acts of parliament? They are already proved to be void. On the discretionary power which the king has of acting where the laws are silent? That power must be subservient to the interest and happiness of those, concerning whom it operates. But I go farther. Instead of being supported by law, or the principles of prerogative, such an alteration is totally and absolutely repugnant to

both. It is contrary to express law. The charter and constitution we speak of are confirmed by the only legislative power capable of confirming them: and no other power, but that which can ratify, can destroy. If it is contrary to express law, the consequence is necessary, that it is contrary to the principles of prerogative: for prerogative can operate only when the law is silent.

In no view can this alteration be justified, or so much as excused. It cannot be justified or excused by the acts of parliament; because the authority of parliament does not extend to it: it cannot be justified or excused by the operation of prerogative; because this is none of the cases, in which prerogative can operate: it cannot be justified or excused by the legislative authority of the colony; because that authority never has been, and, I presume, never will be given for any such purpose.

If I have proceeded hitherto, as I am persuaded I have, upon safe and sure ground, I can, with great confidence, advance a step farther, and say, that all attempts to alter the charter or constitution of that colony, unless by the authority of its own legislature, are violations of its rights, and illegal.

If those attempts are illegal, must not all force, employed to carry them into execution, be force employed against law, and without authority? The conclusion is unavoidable.

Have not British subjects, then, a right to resist such force—force acting without authority—force employed contrary to law—force employed to destroy the very existence of law and of liberty? They have, sir, and this right is secured to them both by

the letter and the spirit of the British constitution, by which the measures and the conditions of their obedience are appointed. The British liberties, sir, and the means and the right of defending them, are not the grants of princes; and of what our princes never granted they surely can never deprive us.

I beg leave, here, to mention and to obviate some plausible but ill founded objections, that have been, and will be, held forth by our adversaries, against the principles of the resolution now before us. It will be observed, that those employed for bringing about the proposed alteration in the charter and constitution of the colony of Massachussetts Bay act by virtue of a commission for that purpose from his majesty: that all resistance of forces commissioned by his majesty, is resistance of his majesty's authority and government, contrary to the duty of allegiance, and treasonable. These objections will be displayed in their most specious colours: every artifice of chicanery and sophistry will be put in practice to establish them: law authorities, perhaps, will be quoted and tortured to prove them. Those principles of our constitution, which were designed to preserve and to secure the liberty of the people, and, for the sake of that, the tranquillity of government, will be perverted on this, as they have been on many other occasions, from their true intention; and will be made use of for the contrary purpose of endangering the latter, and destroying the former. The names of the most exalted virtues, on one hand, and of the most atrocious crimes, on the other, will be employed in direct contradiction to the nature of those virtues, and of those crimes: and, in this manner, those who cannot look beyond names, will be deceived; and those, whose aim it is to deceive by names, will

have an opportunity of accomplishing it. But, sir, this disguise will not impose upon us. We will look to things as well as to names: and, by doing so, we shall be fully satisfied, that all those objections rest upon mere verbal sophistry, and have not even the remotest alliance with the principles of reason or of law.

In the first place, then, I say, that the persons who allege, that those, employed to alter the charter and constitution of Massachussetts Bay, act by virtue of a commission from his majesty for that purpose, speak improperly, and contrary to the truth of the case. I say, they act by virtue of no such commission: I say, it is impossible they can act by virtue of such a commission. What is called a commission either contains particular directions for the purpose mentioned; or it contains no such particular directions. In neither case can those, who act for that purpose, act by virtue of a commission. In one case, what is called a commission is void; it has no legal existence; it can communicate no authority. In the other case, it extends not to the purpose mentioned. The latter point is too plain to be insisted on—I prove the former.

"Id rex potest," says the law, "quod de jure potest."[c] The king's power is a power according to law. His commands, if the authority of Lord Chief Justice Hale[d] may be depended upon, are under the directive power of the law; and consequently invalid, if unlawful. Commis-

[c] 9. Rep. 125.

[d] 1. Hale. P. C. 43. 44. Vide on this head. 4. Bac. 149. 9. Parl. Hist. 168, 170, 179, 180. Vent. 68, 169. 3. Ins. 237, 238, 240.

sions, says my Lord Coke,[e] are legal; and are like the king's writs; and none are lawful, but such as are allowed by the common law, or warranted by some act of parliament.

Let us examine any commission expressly directing those to whom it is given, to use military force for carrying into execution the alterations proposed to be made in the charter and constitution of Massachussetts Bay, by the foregoing maxims and authorities; and what we have said concerning it will appear obvious and conclusive. It is not warranted by any act of parliament; because, as has been mentioned on this, and has been proved on other occasions, any such act is void. It is not warranted, and I believe it will not be pretended that it is warranted, by the common law. It is not warranted by the royal prerogative; because, as has already been fully shown, it is diametrically opposite to the principles and the ends of prerogative. Upon what foundation, then, can it lean and be supported? Upon none. Like an enchanted castle, it may terrify those, whose eyes are affected by the magick influence of the sorcerers, despotism and slavery: but so soon as the charm is dissolved, and the genuine rays of liberty and of the constitution dart in upon us, the formidable appearance vanishes, and we discover that it was the baseless fabrick of a vision, that never had any real existence.

I have dwelt the longer upon this part of the objections urged against us by our adversaries; because this part is the foundation of all the others. We have now removed it; and they must fall of course. For if the force, acting

[e] 3. Ins. 165.

for the purposes we have mentioned, does not act, and cannot act, by virtue of any commission from his majesty, the consequence is undeniable, that it acts without his majesty's authority; that the resistance of it is no resistance of his majesty's authority; nor incompatible with the duties of allegiance.

And now, sir, let me appeal to the impartial tribunal of reason and truth—let me appeal to every unprejudiced and judicious observer of the laws of Britain, and of the constitution of the British government—let me appeal, I say, whether the principles on which I argue, or the principles on which alone my arguments can be opposed, are those which ought to be adhered to and acted upon—which of them are most consonant to our laws and liberties—which of them have the strongest, and are likely to have the most effectual, tendency to establish and secure the royal power and dignity.

Are we deficient in loyalty to his majesty? Let our conduct convict, for it will fully convict, the insinuation, that we are, of falsehood. Our loyalty has always appeared in the true form of loyalty—in obeying our sovereign according to law:[f] let those, who would require it in any other form, know, that we call the persons who execute his commands, when contrary to law, disloyal and traitors. Are we enemies to the power of the crown? No, sir: we are its best friends: this friendship prompts us to

[f] Rebellion being an opposition, not to persons, but authority, which is founded only in the constitution and laws of the government, those, whoever they be, who by force break through, and by force justify the violation of them, are truly and properly rebels. Puffend. 720. 721. notes.

wish, that the power of the crown may be firmly established on the most solid basis: but we know, that the constitution alone will perpetuate the former, and securely uphold the latter. Are our principles irreverent to majesty? They are quite the reverse: we ascribe to it perfection, almost divine. We say, that the king can do no wrong: we say, that to do wrong is the property, not of power, but of weakness. We feel oppression; and will oppose it; but we know—for our constitution tells us—that oppression can never spring from the throne. We must, therefore, search elsewhere for its source: our infallible guide will direct us to it. Our constitution tells us, that all oppression springs from the ministers of the throne. The attributes of perfection, ascribed to the king, are, neither by the constitution, nor in fact, communicable to his ministers. They may do wrong: they have often done wrong: they have been often punished for doing wrong.

Here we may discern the true cause of all the impudent clamour and unsupported accusations of the ministers and of their minions, that have been raised and made against the conduct of the Americans. Those ministers and minions are sensible, that the opposition is directed, not against his majesty, but against them: because they have abused his majesty's confidence, brought discredit upon his government, and derogated from his justice. They see the publick vengeance collected in dark clouds around them: their consciences tell them, that it should be hurled, like a thunder bolt, at their guilty heads. Appalled with guilt and fear, they skulk behind the throne. Is it disrespectful to drag them into publick view, and make a distinction between them and his majesty, under whose venerable name

they daringly attempt to shelter their crimes? Nothing can more effectually contribute to establish his majesty on the throne, and to secure to him the affections of his people, than this distinction. By it we are taught to consider all the blessings of government as flowing from the throne; and to consider every instance of oppression as proceeding, which in truth is oftenest the case, from the ministers.

If, now, it is true, that all force employed for the purposes so often mentioned, is force unwarranted by any act of parliament; unsupported by any principle of the common law; unauthorized by any commission from the crown—that, instead of being employed for the support of the constitution and his majesty's government, it must be employed for the support of oppression and ministerial tyranny—if all this is true—and I flatter myself it appears to be true—can any one hesitate to say, that to resist such force is lawful: and that both the letter and the spirit of the British constitution justify such resistance?

Resistance, both by the letter and the spirit of the British constitution, may be carried farther, when necessity requires it, than I have carried it. Many examples in the English history might be adduced, and many authorities of the greatest weight might be brought, to show, that when the king, forgetting his character and his dignity, has stepped forth, and openly avowed and taken a part in such iniquitous conduct as has been described; in such cases, indeed, the distinction above mentioned, wisely made by the constitution for the security of the crown, could not be applied; because the

crown had unconstitutionally rendered the application of it impossible. What has been the consequence? The distinction between him and his ministers has been lost: but they have not been raised to his situation: he has sunk to theirs.

# SPEECH

DELIVERED ON 26th NOVEMBER, 1787,

IN THE

# CONVENTION OF PENNSYLVANIA,

ASSEMBLED TO TAKE INTO CONSIDERATION THE CONSTITUTION FRAMED, BY THE FEDERAL CONVENTION, FOR THE UNITED STATES.

# SPEECH IN CONVENTION,

## ON 26th NOVEMBER, 1787.

THE system proposed, by the late convention, for the government of the United States, is now before you. Of that convention I had the honour to be a member. As I am the only member of that body who have the honour to be also a member of this, it may be expected that I should prepare the way for the deliberations of this assembly, by unfolding the difficulties which the late convention were obliged to encounter; by pointing out the end which they proposed to accomplish; and by tracing the general principles which they have adopted for the accomplishment of that end.

To form a good system of government for a single city or state, however limited as to territory, or inconsiderable as to numbers, has been thought to require the strongest efforts of human genius. With what conscious diffidence,

then, must the members of the convention have revolved in their minds the immense undertaking which was before them. Their views could not be confined to a small or a single community, but were expanded to a great number of states; several of which contain an extent of territory, and resources of population, equal to those of some of the most respectable kingdoms on the other side of the Atlantick. Nor were even these the only objects to be comprehended within their deliberations. Numerous states yet unformed, myriads of the human race, who will inhabit regions hitherto uncultivated, were to be affected by the result of their proceedings. It was necessary, therefore, to form their calculations on a scale commensurate to a large portion of the globe.

For my own part, I have been often lost in astonishment at the vastness of the prospect before us. To open the navigation of a single river was lately thought, in Europe, an enterprise adequate to imperial glory. But could the commercial scenes of the Scheldt be compared with those that, under a good government, will be exhibited on the Hudson, the Delaware, the Potowmack, and the numerous other rivers, that water and are intended to enrich the dominions of the United States?

The difficulty of the business was equal to its magnitude. No small share of wisdom and address is requisite to combine and reconcile the jarring interests, that prevail, or seem to prevail, in a single community. The United States contain already thirteen governments mutually independent. Those governments present to the Atlantick a front of fifteen hundred miles in extent. Their soil, their climates, their productions, their dimensions, their numbers are different. In many instances a

difference and even an opposition subsists among their interests; and a difference and even an opposition is imagined to subsist in many more. An apparent interest produces the same attachment as a real one; and is often pursued with no less perseverance and vigour. When all these circumstances are seen and attentively considered, will any member of this honourable body be surprised, that such a diversity of things produced a proportioned diversity of sentiment? will he be surprised that such a diversity of sentiment rendered a spirit of mutual forbearance and conciliation indispensably necessary to the success of the great work? and will he be surprised that mutual concessions and sacrifices were the consequences of mutual forbearance and conciliation? When the springs of opposition were so numerous and strong, and poured forth their waters in courses so varying, need we be surprised that the stream formed by their conjunction was impelled in a direction somewhat different from that, which each of them would have taken separately?

I have reason to think that a difficulty arose in the minds of some members of the convention from another consideration—their ideas of the temper and disposition of the people, for whom the constitution is proposed. The citizens of the United States, however different in some other respects, are well known to agree in one strongly marked feature of their character—a warm and keen sense of freedom and independence. This sense has been heightened by the glorious result of their late struggle against all the efforts of one of the most powerful nations of Europe. It was apprehended, I believe, by some, that a people so high spirited would ill brook the restraints of an efficient government. I confess that this consideration did not influence my conduct. I knew my

constituents to be high spirited; but I knew them also to possess sound sense. I knew that, in the event, they would be best pleased with that system of government, which would best promote their freedom and happiness. I have often revolved this subject in my mind. I have supposed one of my constituents to ask me, why I gave such a vote on a particular question? I have always thought it would be a satisfactory answer to say—because I judged, upon the best consideration I could give, that such a vote was right. I have thought that it would be but a very poor compliment to my constituents to say, that, in my opinion, such a vote would have been proper, but that I supposed a contrary one would be more agreeable to those who sent me to the convention. I could not, even in idea, expose myself to such a retort as, upon the last answer, might have been justly made to me. Pray, sir, what reasons have you for supposing that a right vote would displease your constituents? Is this the proper return for the high confidence they have placed in you? If they have given cause for such a surmise, it was by choosing a representative, who could entertain such an opinion of them. I was under no apprehension, that the good people of this state would behold with displeasure the brightness of the rays of delegated power, when it only proved the superiour splendour of the luminary, of which those rays were only the reflection.

A very important difficulty arose from comparing the extent of the country to be governed, with the kind of government which it would be proper to establish in it. It has been an opinion, countenanced by high authority, "that the natural property of small states is, to be governed as a republick; of middling ones, to be subject to a monarch; and of large empires, to be swayed by a des-

potick prince; and that the consequence is, that, in order to preserve the principles of the established government, the state must be supported in the extent it has acquired; and that the spirit of the state will alter in proportion as it extends or contracts its limits."[a] This opinion seems to be supported, rather than contradicted, by the history of the governments in the old world. Here then the difficulty appeared in full view. On one hand, the United States contain an immense extent of territory, and, according to the foregoing opinion, a despotick government is best adapted to that extent. On the other hand, it was well known, that, however the citizens of the United States might, with pleasure, submit to the legitimate restraints of a republican constitution, they would reject, with indignation, the fetters of despotism. What then was to be done? The idea of a confederate republick presented itself. This kind of constitution has been thought to have "all the internal advantages of a republican, together with the external force of a monarchical government."[b] Its description is, "a convention, by which several states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of farther association."[c] The expanding quality of such a government is peculiarly fitted for the United States, the greatest part of whose territory is yet uncultivated.

But while this form of government enabled us to surmount the difficulty last mentioned, it conducted us to another, of which I am now to take notice. It left us

[a] Mont. Sp. L. b. 8. c. 20. [b] Id. b. 9. c. 1. 1. Paley, 199—202.

[c] Mont. Sp. L. b. 9. c. 1.

almost without precedent or guide; and consequently, without the benefit of that instruction, which, in many cases, may be derived from the constitution, and history, and experience of other nations. Several associations have frequently been called by the name of confederate states, which have not, in propriety of language, deserved it. The Swiss cantons are connected only by alliances. The United Netherlands are indeed an assemblage of societies; but this assemblage constitutes no *new one;* and, therefore, it does not correspond with the full definition of a confederate republick. The Germanick body is composed of such disproportioned and discordant materials, and its structure is so intricate and complex, that little useful knowledge can be drawn from it. Ancient history discloses, and barely discloses to our view, some confederate republicks—the Achæan league, the Lycian confederacy, and the Amphyctionick council. But the facts recorded concerning their constitutions are so few and general, and their histories are so unmarked and defective, that no satisfactory information can be collected from them concerning many particular circumstances, from an accurate discernment and comparison of which alone, legitimate and practical inferences can be made from one constitution to another. Besides, the situation and dimensions of those confederacies, and the state of society, manners, and habits in them, were so different from those of the United States, that the most correct descriptions could have supplied but a very small fund of applicable remark. Thus, in forming this system, we were deprived of many advantages, which the history and experience of other ages and other countries would, in other cases, have afforded us.

Permit me to add, in this place, that the science even of government itself seems yet to be almost in its state of infancy. Governments, in general, have been the result of force, of fraud, and of accident. After a period of six thousand years has elapsed since the creation, the United States exhibit to the world the first instance, as far as we can learn, of a nation, unattacked by external force, unconvulsed by domestick insurrections, assembling voluntarily, deliberating fully, and deciding calmly, concerning that system of government, under which they would wish that they and their posterity should live. The ancients, so enlightened on other subjects, were very uninformed with regard to this. They seem scarcely to have had any idea of any other kinds of governments, than the three simple forms designated by the epithets, monarchical, aristocratical, and democratical. I know that much and pleasing ingenuity has been exerted, in modern times, in drawing entertaining parallels between some of the ancient constitutions and some of the mixed governments that have since existed in Europe. But I much suspect that, on strict examination, the instances of resemblance will be found to be few and weak; to be suggested by the improvements, which, in subsequent ages, have been made in government, and not to be drawn immediately from the ancient constitutions themselves, as they were intended and understood by those who framed them. To illustrate this, a similar observation may be made on another subject. Admiring criticks have fancied, that they have discovered in their favourite Homer the seeds of all the improvements in philosophy, and in the sciences, made since his time. What induces me to be of this opinion is, that Tacitus, the profound politician Tacitus, who lived towards the latter end of those ages which are now denominated

ancient, who undoubtedly had studied the constitutions of all the states and kingdoms known before and in his time, and who certainly was qualified, in an uncommon degree, for understanding the full force and operation of each of them, considers, after all he had known and read, a mixed government, composed of the three simple forms, as a thing rather to be wished than expected: and he thinks, that if such a government could even be instituted, its duration could not be long. One thing is very certain, that the doctrine of representation in government was altogether unknown to the ancients. Now the knowledge and practice of this doctrine is, in my opinion, essential to every system, that can possess the qualities of freedom, wisdom, and energy.

It is worthy of remark, and the remark may, perhaps, excite some surprise, that representation of the people is not, even at this day, the sole principle of any government in Europe. Great Britain boasts, and she may well boast, of the improvement she has made in politicks, by the admission of representation: for the improvement is important as far as it goes; but it by no means goes far enough. Is the executive power of Great Britain founded on representation? This is not pretended. Before the revolution, many of the kings claimed to reign by divine right, and others by hereditary right; and even at the revolution, nothing farther was effected or attempted, than the recognition of certain parts of an original contract,[d] supposed at some remote period to have been made between the king and the people. A contract seems to exclude, rather than to imply, delegated power. The judges of Great Britain

[d] 1. Bl. Com. 233.

are appointed by the crown. The judicial authority, therefore, does not depend upon representation, even in its most remote degree. Does representation prevail in the legislative department of the British government? Even here it does not predominate; though it may serve as a check. The legislature consists of three branches, the king, the lords, and the commons. Of these, only the latter are supposed by the constitution to represent the authority of the people. This short analysis clearly shows, to what a narrow corner of the British constitution the principle of representation is confined. I believe it does not extend farther, if so far, in any other government in Europe. For the American States were reserved the glory and the happiness of diffusing this vital principle through all the constituent parts of government. Representation is the chain of communication between the people, and those to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible.

To be left without guide or precedent was not the only difficulty, in which the convention were involved, by proposing to their constituents a plan of a confederate republick. They found themselves embarrassed with another of peculiar delicacy and importance; I mean that of drawing a proper line between the national government and the governments of the several states. It was easy to discover a proper and satisfactory principle on the subject. Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of govern-

ment extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care. It is only in mathematical science, that a line can be described with mathematical precision. But I flatter myself that, upon the strictest investigation, the enumeration will be found to be safe and unexceptionable; and accurate too, in as great a degree as accuracy can be expected in a subject of this nature. Particulars under this head will be more properly explained, when we descend to the minute view of the enumeration which is made in the proposed constitution.

After all, it will be necessary, that, on a subject so peculiarly delicate as this, much prudence, much candour, much moderation, and much liberality should be exercised and displayed, both by the federal government and by the governments of the several states. It is to be hoped, that those virtues in government will be exercised and displayed, when we consider, that the powers of the federal government and those of the state governments are drawn from sources equally pure. If a difference can be discovered between them, it is in favour of the federal government; because that government is founded on a representation of the whole union; whereas the

government of any particular state is founded only on the representation of a part, inconsiderable when compared with the whole. Is it not more reasonable to suppose, that the counsels of the whole will embrace the interest of every part, than that the counsels of any part will embrace the interests of the whole.

I intend not, sir, by this description of the difficulties with which the convention were surrounded, to magnify their skill or their merit in surmounting them, or to insinuate that any predicament, in which the convention stood, should prevent the closest and most cautious scrutiny into the performance, which they have exhibited to their constituents and to the world. My intention is of far other and higher aim—to evince by the conflicts and difficulties which must arise from the many and powerful causes which I have enumerated, that it is hopeless and impracticable to form a constitution, which will, in every part, be acceptable to every citizen, or even to every government in the United States; and that all which can be expected is, to form such a constitution as, upon the whole, is the best that can possibly be obtained. Man and perfection!—a state and perfection!—an assemblage of states and perfection! Can we reasonably expect, however ardently we may wish, to behold the glorious union?

I can well recollect, though I believe I cannot convey to others, the impression, which, on many occasions, was made by the difficulties which surrounded and pressed the convention. The great undertaking, at some times, seemed to be at a stand; at other times, its motions seemed to be retrograde. At the conclusion, however,

of our work, many of the members expressed their astonishment at the success with which it terminated.

Having enumerated some of the difficulties which the convention were obliged to encounter in the course of their proceedings, I shall next point out the end which they proposed to accomplish. Our wants, our talents, our affections, our passions, all tell us that we were made for a state of society. But a state of society could not be supported long or happily without some civil restraint. It is true that, in a state of nature, any one individual may act uncontrolled by others; but it is equally true, that, in such a state, every other individual may act uncontrolled by him. Amidst this universal independence, the dissensions and animosities between interfering members of the society would be numerous and ungovernable. The consequence would be, that each member, in such a natural state, would enjoy less liberty, and suffer more interruption, than he would in a regulated society. Hence the universal introduction of governments of some kind or other into the social state. The liberty of every member is increased by this introduction; for each gains more by the limitation of the freedom of every other member, than he loses by the limitation of his own. The result is, that civil government is necessary to the perfection and happiness of man. In forming this government, and carrying it into execution, it is essential that the interest and authority of the whole community should be binding on every part of it.

The foregoing principles and conclusions are generally admitted to be just and sound with regard to the nature and formation of single governments, and the duty of submission to them. In some cases they will apply, with much propriety and force, to states already formed.

The advantages and necessity of civil government among individuals in society are not greater or stronger than, in some situations and circumstances, are the advantages and necessity of a federal government among states. A natural and a very important question now presents itself. Is such the situation—are such the circumstances of the United States? A proper answer to this question will unfold some very interesting truths.

The United States may adopt any one of four different systems. They may become consolidated into one government, in which the separate existence of the states shall be entirely absorbed. They may reject any plan of union or association, and act as separate and unconnected states. They may form two or more confederacies. They may unite in one federal republick. Which of these systems ought to have been proposed by the convention?—To support with vigour, a single government over the whole extent of the United States, would demand a system of the most unqualified and the most unremitted despotism. Such a number of separate states, contiguous in situation, unconnected and disunited in government, would be, at one time, the prey of foreign force, foreign influence, and foreign intrigue; at another, the victim of mutual rage, rancour, and revenge. Neither of these systems found advocates in the late convention: I presume they will not find advocates in this. Would it be proper to divide the United States into two or more confederacies? It will not be unadvisable to take a more minute survey of this subject. Some aspects, under which it may be viewed, are far from being, at first sight, uninviting. Two or more confederacies would be each more compact and more manageable, than a single one extending over the same territory. By dividing the United States into two or

more confederacies, the great collision of interests, apparently or really different and contrary, in the whole extent of their dominion, would be broken, and in a great measure disappear in the several parts. But these advantages, which are discovered from certain points of view, are greatly overbalanced by inconveniences that will appear on a more accurate examination. Animosities, and perhaps wars, would arise from assigning the extent, the limits, and the rights of the different confederacies. The expenses of governing would be multiplied by the number of federal governments. The danger resulting from foreign influence and mutual dissensions would not, perhaps, be less great and alarming in the instance of different confederacies, than in the instance of different though more numerous unassociated states. These observations, and many others that might be made on the subject, will be sufficient to evince, that a division of the United States into a number of separate confederacies would probably be an unsatisfactory and an unsuccessful experiment. The remaining system which the American States may adopt is, a union of them under one confederate republick. It will not be necessary to employ much time or many arguments to show, that this is the most eligible system that can be proposed. By adopting this system, the vigour and decision of a wide spreading monarchy may be joined to the freedom and beneficence of a contracted republick. The extent of territory, the diversity of climate and soil, the number, and greatness, and connexion of lakes and rivers, with which the United States are intersected and almost surrounded, all indicate an enlarged government to be fit and advantageous for them. The principles and dispositions of their citizens indicate, that in this government liberty shall reign triumphant. Such indeed have been the general opinions and wishes entertained since

the era of our independence. If those opinions and wishes are as well founded as they have been general, the late convention were justified in proposing to their constituents one confederate republick, as the best system of a national government for the United States.

In forming this system, it was proper to give minute attention to the interest of all the parts; but there was a duty of still higher import—to feel and to show a predominating regard to the superiour interests of the whole. If this great principle had not prevailed, the plan before us would never have made its appearance. The same principle that was so necessary in forming it, is equally necessary in our deliberations, whether we should reject or ratify it.

I make these observations with a design to prove and illustrate this great and important truth—that in our decisions on the work of the late convention, we should not limit our views and regards to the state of Pennsylvania. The aim of the convention was, to form a system of good and efficient government on the more extensive scale of the United States. In this, as in every other instance, the work should be judged with the same spirit with which it was performed. A principle of duty as well as of candour demands this.

We have remarked, that civil government is necessary to the perfection of society: we now remark, that civil liberty is necessary to the perfection of civil government. Civil liberty is natural liberty itself, devested only of that part, which, placed in the government, produces more good and happiness to the community, than if it had remained in the individual. Hence it follows, that civil

liberty, while it resigns a part of natural liberty, retains the free and generous exercise of all the human faculties, so far as it is compatible with the publick welfare.

In considering and developing the nature and end of the system before us, it is necessary to mention another kind of liberty, which has not yet, as far as I know, received a name. I shall distinguish it by the appellation of *federal liberty*. When a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men. When a confederate republick is instituted, the communities of which it is composed surrender to it a part of their political independence, which they before enjoyed as states. The principles which directed, in the former case, what part of the natural liberty of the man ought to be given up, and what part ought to be retained, will give similar directions in the latter case. The states should resign to the national government that part, and that part only, of their political liberty, which, placed in that government, will produce more good to the whole, than if it had remained in the several states. While they resign this part of their political liberty, they retain the free and generous exercise of all their other faculties as states, so far as it is compatible with the welfare of the general and superintending confederacy.

Since states as well as citizens are represented in the constitution before us, and form the objects on which that constitution is proposed to operate, it was necessary to notice and define federal as well as civil liberty.

These general reflections have been made in order to introduce, with more propriety and advantage, a practical

illustration of the end proposed to be accomplished by the late convention.

It has been too well known—it has been too severely felt—that the present confederation is inadequate to the government and to the exigencies of the United States. The great struggle for liberty in this country, should it be unsuccessful, will probably be the last one which she will have for her existence and prosperity, in any part of the globe. And it must be confessed, that this struggle has, in some of the stages of its progress, been attended with symptoms that foreboded no fortunate issue. To the iron hand of tyranny, which was lifted up against her, she manifested, indeed, an intrepid superiority. She broke in pieces the fetters which were forged for her, and showed that she was unassailable by force. But she was environed by dangers of another kind, and springing from a very different source. While she kept her eye steadily fixed on the efforts of oppression, licentiousness was secretly undermining the rock on which she stood.

Need I call to your remembrance the contrasted scenes, of which we have been witnesses? On the glorious conclusion of our conflict with Britain, what high expectations were formed concerning us by others! What high expectations did we form concerning ourselves! Have those expectations been realized? No. What has been the cause? Did our citizens lose their perseverance and magnanimity? No. Did they become insensible of resentment and indignation at any high handed attempt, that might have been made to injure or enslave them? No. What then has been the cause? The truth is, we dreaded danger only on one side: this we manfully repelled. But on another side, danger, not less formidable, but more

insidious, stole in upon us; and our unsuspicious tempers were not sufficiently attentive, either to its approach or to its operations. Those, whom foreign strength could not overpower, have well nigh become the victims of internal anarchy.

If we become a little more particular, we shall find that the foregoing representation is by no means exaggerated. When we had baffled all the menaces of foreign power, we neglected to establish among ourselves a government, that would ensure domestick vigour and stability. What was the consequence? The commencement of peace was the commencement of every disgrace and distress, that could befal a people in a peaceful state. Devoid of national power, we could not prohibit the extravagance of our importations, nor could we derive a revenue from their excess. Devoid of national importance, we could not procure for our exports a tolerable sale at foreign markets. Devoid of national credit, we saw our publick securities melt in the hands of the holders, like snow before the sun. Devoid of national dignity, we could not, in some instances, perform our treaties on our parts; and, in other instances, we could neither obtain nor compel the performance of them on the part of others. Devoid of national energy, we could not carry into execution our own resolutions, decisions, or laws.

Shall I become more particular still? The tedious detail would disgust me: nor is it now necessary. The years of languor are past. We have felt the dishonour, with which we have been covered: we have seen the destruction with which we have been threatened. We have penetrated to the causes of both, and when we have once discovered them, we have begun to search

for the means of removing them. For the confirmation of these remarks, I need not appeal to an enumeration of facts. The proceedings of congress, and of the several states, are replete with them. They all point out the weakness and insufficiency of the present confederation as the cause, and an efficient general government as the only cure of our political distempers.

Under these impressions, and with these views, was the late convention appointed; and under these impressions, and with these views, the late convention met.

We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one federal and national constitution —a constitution that would produce the advantages of good, and prevent the inconveniences of bad government —a constitution, whose beneficence and energy would pervade the whole union, and bind and embrace the interests of every part—a constitution that would ensure peace, freedom, and happiness, to the states and people of America.

We are now naturally led to examine the means, by which they proposed to accomplish this end. This opens more particularly to our view the important discussion before us. But previously to our entering upon it, it will not be improper to state some general and leading principles of government, which will receive particular applications in the course of our investigations.

There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute, and uncontrollable.

Where does this power reside? To this question, writers on different governments will give different answers. Sir William Blackstone will tell you, that in Britain, the power is lodged in the British parliament; that the parliament may alter the form of the government; and that its power is absolute and without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice, conformable to such a principle. The British constitution is just what the British parliament pleases. When the parliament transferred legislative authority to Henry the eighth, the act transferring it could not, in the strict acceptation of the term, be called unconstitutional.

To control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States.

Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that, in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superiour to our legislatures; so the people are superiour to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess, over our constitutions, control in act, as well as in right.

The consequence is, that the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.

These important truths, sir, are far from being merely speculative: we, at this moment, speak and deliberate under their immediate and benign influence. To the operation of these truths, we are to ascribe the scene, hitherto unparallelled, which America now exhibits to the world—a gentle, a peaceful, a voluntary, and a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind.

Oft have I viewed with silent pleasure and admiration the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they never part with it. It may be called the *panacea* in politicks. There can be no disorder in the community but may here receive a radical cure. If the errour be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy: from their power, as we have seen, there is no appeal: to their errour, there is no superiour principle of correction.

There are three simple species of government—monarchy, where the supreme power is in a single person—aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to their places in it by inheritance, property, or in respect of some personal right or qualification—a republick or democracy, where the people at large retain the supreme power, and act either collectively or by representation.

Each of these species of government has its advantages and disadvantages.

The advantages of a monarchy are, strength, despatch, secrecy, unity of counsel. Its disadvantages are, tyranny, expense, ignorance of the situation and wants of the people, insecurity, unnecessary wars, evils attending elections or successions.

The advantages of aristocracy are, wisdom, arising from experience and education. Its disadvantages are, dissensions among themselves, oppression to the lower orders.

The advantages of democracy are, liberty, equal, cautious, and salutary laws, publick spirit, frugality, peace, opportunities of exciting and producing abilities of the best citizens. Its disadvantages are, dissensions, the delay and disclosure of publick counsels, the imbecility of publick measures retarded by the necessity of a numerous consent.

A government may be composed of two or more of the simple forms abovementioned. Such is the British

government. It would be an improper government for the United States; because it is inadequate to such an extent of territory; and because it is suited to an establishment of different orders of men. A more minute comparison between some parts of the British constitution, and some parts of the plan before us, may, perhaps, find a proper place in a subsequent period of our business.

What is the nature and kind of that government, which has been proposed for the United States, by the late convention? In its principle, it is purely democratical: but that principle is applied in different forms, in order to obtain the advantages, and exclude the inconveniences of the simple modes of government.

If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning, and fertilizing the fields and meadows, through which their courses are led; but if we trace them, we shall discover, that they all originally flow from one abundant fountain. In this constitution, all authority is derived from THE PEOPLE.

Fit occasions will hereafter offer for particular remarks on the different parts of the plan. I have now to ask pardon of the house for detaining them so long.

# ORATION

DELIVERED ON THE FOURTH OF JULY 1788,

AT THE

PROCESSION FORMED AT PHILADELPHIA

TO CELEBRATE THE

ADOPTION OF THE CONSTITUTION

OF THE UNITED STATES.

# ORATION

DELIVERED AT THE

# PROCESSION IN PHILADELPHIA.

MY FRIENDS AND FELLOW CITIZENS,

YOUR candid and generous indulgence I may well bespeak, for many reasons. I shall mention but one. While I express it, I feel it in all its force. My abilities are unequal—abilities far superiour to mine would be unequal—to the occasion on which I have the honour of being called to address you.

A people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined, and approved! This is the spectacle, which we are assembled to celebrate; and it is the most dignified one that has yet appeared on our globe. Numerous and splendid have been the triumphs of conquerors. But from what causes have they originated? —Of what consequences have they been productive?

They have generally begun in ambition: they have generally ended in tyranny. But nothing tyrannical can participate of dignity: and to freedom's eye, Sesostris himself appears contemptible, even when he treads on the necks of kings.

The senators of Rome, seated on their curule chairs, and surrounded with all their official lustre, were an object much more respectable: and we view, without displeasure, the admiration of those untutored savages, who considered them as so many gods upon earth. But who were those senators? They were only a part of a society: they were vested only with inferiour powers.

What is the object exhibited to our contemplation? A whole people exercising its first and greatest power—performing an act of sovereignty, original and unlimited!

The scene before us is unexampled as well as magnificent. The greatest part of governments have been the deformed offspring of force and fear. With these we deign not comparison. But there have been others which have formed bold pretensions to higher regard. You have heard of Sparta, of Athens, and of Rome; you have heard of their admired constitutions, and of their high-prized freedom. In fancied right of these, they conceived themselves to be elevated above the rest of the human race, whom they marked with the degrading title of barbarians. But did they, in all their pomp and pride of liberty, ever furnish, to the astonished world, an exhibition similar to that which we now contemplate? Were their constitutions framed by those, who were appointed for that purpose, by the people? After they were framed, were they submitted to the consideration of the people?

Had the people an opportunity of expressing their sentiments concerning them? Were they to stand or fall by the people's approving or rejecting vote? To all these questions, attentive and impartial history obliges us to answer in the negative. The people were either unfit to be trusted, or their lawgivers were too ambitious to trust them.

The far-famed establishment of Lycurgus was introduced by deception and fraud. Under the specious pretence of consulting the oracle concerning his laws, he prevailed on the Spartans to make a temporary experiment of them during his absence, and to swear that they would suffer no alteration of them till his return. Taking a disingenuous advantage of their scrupulous regard for their oaths, he prevented his return by a voluntary death, and, in this manner, endeavoured to secure a proud immortality to his system.

Even Solon—the mild and moderating Solon—far from considering himself as employed only to *propose* such regulations as he should think best calculated for promoting the happiness of the commonwealth, made and promulgated his laws with all the haughty airs of absolute power. On more occasions than one, we find him boasting, with much selfcomplacency, of his extreme forbearance and condescension, because he did not establish a despotism in his own favour, and because he did not reduce his equals to the humiliating condition of his slaves.

Did Numa submit his institutions to the good sense and free investigation of Rome? They were received in precious communications from the goddess Egeria, with whose presence and regard he was supremely favoured;

and they were imposed on the easy faith of the citizens, as the dictates of an inspiration that was divine.

Such, my fellow citizens, was the origin of the most splendid establishments that have been hitherto known; and such were the arts, to which they owed their introduction and success.

What a flattering contrast arises from a retrospect of the scenes which we now commemorate? Delegates were appointed to deliberate and propose. They met and performed their delegated trust. The result of their deliberations was laid before the people. It was discussed and scrutinized in the fullest, freest, and severest manner—by speaking, by writing, and by printing—by individuals and by publick bodies—by its friends and by its enemies. What was the issue? Most favourable and most glorious to the system. In state after state, at time after time, it was ratified—in some states unanimously—on the whole, by a large and very respectable majority.

It would be improper now to examine its qualities. A decent respect for those who have accepted it, will lead us to presume that it is worthy of their acceptance. The deliberate ratifications, which have taken place, at once recommend the system, and the people by whom it has been ratified.

But why, methinks I hear some one say—why is so much exultation displayed in celebrating this event? We are prepared to give the reasons of our joy. We rejoice, because, under this constitution, we hope to see just

government, and to enjoy the blessings that walk in its train.

Let us begin with Peace—the mild and modest harbinger of felicity! How seldom does the amiable wanderer choose, for her permanent residence, the habitations of men! In their systems, she sees too many arrangements, civil and ecclesiastical, inconsistent with the calmness and benignity of her temper. In the old world, how many millions of men do we behold, unprofitable to society, burthensome to industry, the props of establishments that deserve not to be supported, the causes of distrust in the times of peace, and the instruments of destruction in the times of war? Why are they not employed in cultivating useful arts, and in forwarding publick improvements? Let us indulge the pleasing expectation, that such will be the operation of government in the United States. Why may we not hope, that, disentangled from the intrigues and jealousies of European politicks, and unmolested with the alarm and solicitude to which these intrigues and jealousies give birth, our counsels will be directed to the encouragement, and our strength will be exerted in the cultivation, of all the arts of peace?

Of these, the first is agriculture. This is true in all countries: in the United States, its truth is of peculiar importance. The subsistence of man, the materials of manufactures, the articles of commerce—all spring originally from the soil. On agriculture, therefore, the wealth of nations is founded. Whether we consult the observations that reason will suggest, or attend to the information that history will give, we shall, in each case, be satisfied of the influence of government, good or bad,

upon the state of agriculture. In a government, whose maxims are those of oppression, property is insecure. It is given, it is taken away, by caprice. Where there is no security for property, there is no encouragement for industry. Without industry, the richer the soil, the more it abounds with weeds. The evidence of history warrants the truth of these general remarks. Attend to Greece; and compare her agriculture in ancient and in modern times. Then, smiling harvests bore testimony to the bountiful boons of liberty. Now, the very earth languishes under oppression. View the Campania of Rome. How melancholy the prospect! Whichever way you turn your afflicted eyes, scenes of desolation crowd before them. Waste and barrenness appear around you in all their hideous forms. What is the reason? With double tyranny the land is cursed. Open the classick page: you trace, in chaste description, the beautiful reverse of every thing you have seen. Whence proceeds the difference? When that description was made, the force of liberty pervaded the soil.

But is agriculture the only art, which feels the influence of government? Over manufactures and commerce its power is equally prevalent. There the same causes operate—and there they produce the same effects. The industrious village, the busy city, the crowded port—all these are the gifts of liberty; and without a good government, liberty cannot exist.

These are advantages, but these are not all the advantages, that result from a system of good government.—Agriculture, manufactures, and commerce will ensure to us plenty, convenience, and elegance. But is there not something still wanting to finish the man? Are internal

virtues and accomplishments less estimable, or less attracting than external arts and ornaments? Is the operation of government less powerful upon the former than upon the latter? By no means. Upon this as upon a preceding topick, reason and history will concur in their information and advice. In a serene mind, the sciences and the virtues love to dwell. But can the mind of a man be serene, when the property, liberty, subsistence of himself, and of those for whom he feels more than he feels for himself, depend on a tyrant's nod. If the dispirited subject of oppression can, with difficulty, exert his enfeebled faculties, so far as to provide, on the incessant demands of nature, food just enough to lengthen out his wretched existence, can it be expected that, in such a state, he will experience those fine and vigorous movements of the soul, without the full and free exercise of which, science and virtue will never flourish? Look around you to the nations that now exist. View, in historick retrospect, the nations that have heretofore existed. The collected result will be, an entire conviction of these all-interesting truths—where tyranny reigns, there is the country of ignorance and vice—where good government prevails, there is the country of science and virtue. Under a good government, therefore, we must look for the accomplished man.

But shall we confine our views even here? While we wish to be accomplished men and citizens, shall we wish to be nothing more? While we perform our duty, and promote our happiness in this world, shall we bestow no regards upon the next? Does no connexion subsist between the two? From this connexion flows the most important of all the blessings of good government. But here let us pause—unassisted reason can guide us no farther—she directs us to that heaven-descended sci-

ence, by which life and immortality have been brought to light.

May we not now say, that we have reason for our joy? But while we cherish the delightful emotion, let us remember those things, which are requisite to give it permanence and stability. Shall we lie supine, and look in listless langour, for those blessings and enjoyments, to which exertion is inseparably attached? If we would be happy, we must be active. The constitution and our manners must mutually support and be supported. Even on this festivity, it will not be disagreeable or incongruous to review the virtues and manners that both justify and adorn it.

Frugality and temperance first attract our attention. These simple but powerful virtues are the sole foundation, on which a good government can rest with security. They were the virtues, which nursed and educated infant Rome, and prepared her for all her greatness. But in the giddy hour of her prosperity, she spurned from her the obscure instruments, by which it was procured; and, in their place, substituted luxury and dissipation. The consequence was such as might have been expected. She preserved, for some time, a gay and flourishing appearance; but the internal health and soundness of her constitution were gone. At last, she fell a victim to the poisonous draughts, which were administered by her perfidious favourites. The fate of Rome, both in her rising and in her falling state, will be the fate of every other nation that shall follow both parts of her example.

Industry appears next among the virtues of a good citizen. Idleness is the nurse of villains. The industrious

alone constitute a nation's strength. I will not expatiate on this fruitful subject. Let one animating reflection suffice. In a well constituted commonwealth, the industry of every citizen extends beyond himself. A common interest pervades the society. Each gains from all, and all gain from each. It has often been observed, that the sciences flourish all together: the remark applies equally to the arts.

Your patriotick feelings attest the truth of what I say, when, among the virtues necessary to merit and preserve the advantages of a good government, I number a warm and uniform attachment to liberty, and to the constitution. The enemies of liberty are artful and insidious. A counterfeit steals her dress, imitates her manner, forges her signature, assumes her name. But the real name of the deceiver is licentiousness. Such is her effrontery, that she will charge liberty to her face with imposture: and she will, with shameless front, insist that herself alone is the genuine character, and that herself alone is entitled to the respect, which the genuine character deserves. With the giddy and undiscerning, on whom a deeper impression is made by dauntless impudence than by modest merit, her pretensions are often successful. She receives the honours of liberty, and liberty herself is treated as a traitor and a usurper. Generally, however, this bold impostor acts only a secondary part. Though she alone appear upon the stage, her motions are regulated by dark ambition, who sits concealed behind the curtain, and who knows that despotism, his other favourite, can always follow the success of licentiousness. Against these enemies of liberty, who act in concert, though they appear on opposite sides, the patriot citizen will keep a watchful guard.

A good constitution is the greatest blessing, which a society can enjoy. Need I infer, that it is the duty of every citizen to use his best and most unremitting endeavours for preserving it pure, healthful, and vigorous? For the accomplishment of this great purpose, the exertions of no one citizen are unimportant. Let no one, therefore, harbour, for a moment, the mean idea, that he is and can be of no value to his country: let the contrary manly impression animate his soul. Every one can, at *many* times, perform, to the state, *useful* services; and he, who steadily pursues the road of patriotism, has the most inviting prospect of being able, at *some* times, to perform *eminent* ones. Allow me to direct your attention, in a very particular manner, to a momentous part, which, by this constitution, every citizen will frequently be called to act. All those in places of power and trust will be elected either immediately by the people, or in such a manner that their appointment will depend ultimately on such immediate election. All the derivative movements of government must spring from the original movement of the people at large. If to this they give a sufficient force and a just direction, all the others will be governed by its controlling power. To speak without a metaphor, if the people, at their elections, take care to choose none but representatives that are wise and good, their representatives will take care, in their turn, to choose or appoint none but such as are wise and good also. The remark applies to every succeeding election and appointment. Thus the characters proper for publick officers will be diffused from the immediate elections of the people over the remotest parts of administration. Of what immense consequence is it, then, that this primary duty should be faithfully and skilfully discharged! On the faithful and skilful discharge of it,

the publick happiness or infelicity, under this and every other constitution, must, in a very great measure, depend. For, believe me, no government, even the best, can be happily administered by ignorant or vicious men. You will forgive me, I am sure, for endeavouring to impress upon your minds, in the strongest manner, the importance of this great duty. It is the first concoction in politicks; and if an errour is committed here, it can never be corrected in any subsequent process: the certain consequence must be disease. Let no one say, that he is but a single citizen; and that his ticket will be but one in the box. That one ticket may turn the election. In battle, every soldier should consider the publick safety as depending on his single arm: at an election, every citizen should consider the publick happiness as depending on his single vote.

A progressive state is necessary to the happiness and perfection of man. Whatever attainments are already reached, attainments still higher should be pursued. Let us, therefore, strive with noble emulation. Let us suppose we have done nothing, while any thing yet remains to be done. Let us, with fervent zeal, press forward, and make unceasing advances in every thing that can support, improve, refine, or embellish society. To enter into particulars under each of these heads, and to dilate them according to their importance, would be improper at this time. A few remarks on the last of them will be congenial with the entertainments of this auspicious day.

If we give the slightest attention to nature, we shall discover, that with utility, she is curious to blend ornament. Can we imitate a better pattern? Publick

exhibitions have been the favourite amusements of some of the wisest and most accomplished nations. Greece, in her most shining era, considered her games as far from being the least respectable among her publick establishments. The shows of the circus evince that, on this subject, the sentiments of Greece were fortified by those of Rome.

Publick processions may be so planned and executed as to join both the properties of nature's rule. They may instruct and improve, while they entertain and please. They may point out the elegance or usefulness of the sciences and the arts. They may preserve the memory, and engrave the importance of great political events. They may represent, with peculiar felicity and force, the operation and effects of great political truths. The picturesque and splendid decorations around me furnish the most beautiful and most brilliant proofs, that these remarks are far from being imaginary.

The commencement of our government has been eminently glorious: let our progress in every excellence be proportionably great. It will—it must be so. What an enrapturing prospect opens on the United States! Placid husbandry walks in front, attended by the venerable plough. Lowing herds adorn our vallies: bleating flocks spread over our hills: verdant meadows, enamelled pastures, yellow harvests, bending orchards, rise in rapid succession from east to west. Plenty, with her copious horn, sits easy smiling, and, in conscious complacency, enjoys and presides over the scenes. Commerce next advances in all her splendid and embellished forms. The rivers, and lakes, and seas, are crowded with ships. Their shores are covered with cities. The cities are

filled with inhabitants. The arts, decked with elegance, yet with simplicity, appear in beautiful variety, and well adjusted arrangement. Around them are diffused, in rich abundance, the necessaries, the decencies, and the ornaments of life. With heartfelt contentment, industry beholds his honest labours flourishing and secure. Peace walks serene and unalarmed over all the unmolested regions—while liberty, virtue, and religion go hand in hand, harmoniously, protecting, enlivening, and exalting all! Happy country! May thy happiness be perpetual!

# SPEECH

ON CHOOSING THE MEMBERS OF THE SENATE

BY ELECTORS;

DELIVERED, ON 31st DECEMBER, 1789,

IN THE CONVENTION OF PENNSYLVANIA,

ASSEMBLED FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THE STATE.

# SPEECH IN CONVENTION,[a]

## ON 31st DECEMBER, 1789.

WELL assured I am, that the subject now before the convention must appear to honourable members, for

[a] The debate, in the course of which this speech was delivered, related to the following provisions in the draft of a constitution reported to the convention by a committee appointed for the purpose.

"The citizens of the city of Philadelphia and of the several counties in this state, qualified to elect representatives, when assembled for that purpose, shall, if occasion require, at the same time, at the same places, and in the same manner, for every representative, elect two persons resident within their city or county respectively, as electors of the senator or senators of their district.

"Within days after their election, the electors of each district shall meet together at some convenient place within the district, and elect the senator or senators for their district.

"No elector shall be chosen a senator.

whom I have much regard, under an aspect very different from that, in which it makes its approaches to me. Indeed it has not always appeared to myself in precisely the same light, in which I now view it. One reason may be, that I have not formerly been accustomed to contemplate it from the point of sight, at which I now stand, and from which it is my duty, enjoined by the strongest ties, to make the most attentive and accurate observations. I have considered it as a subject of speculative discussion. I have taken of it such a slight and general survey, as one person would take of the estate of another, without any expectation that it, or one similar to it, would ever become his own. On such a vague and superficial examination, I have not studied or investigated its inconveniences or defects.

The very respectable senate of Maryland, chosen by electors, furnishes with letters of recommendation every institution, to which it bears even a distant resemblance. The moderation, the firmness, the wisdom, and the consistency, which have characterized the proceedings of that body, have been of signal benefit to the state, of whose government it forms a part; and have been the theme of just applause in her sister states. It is by no means surprising, that a favourable opinion has been entertained concerning the principles and manner of its constitution.

"No person shall be chosen an elector, who shall not have resided in the district three years next before his election. And no person shall be chosen an elector, who is a member of the legislature, or who holds any office in the appointment of the executive department." *Ed.*

But now that the question relative to those points comes before us, in the discharge of our high trust, we must devest ourselves of every prepossession, which we may have hitherto indulged; and must scrutinize the subject closely, strictly, deeply, and minutely. It is incumbent upon us to weigh well, 1. Whether the qualities, that so deservedly appreciate the senate of Maryland, may not be secured to a senate, formed and organized upon very different and more eligible principles. 2. Whether the principles, upon which that senate has been formed and organized, are applicable to the plan laid before the convention.

It is admitted, on one side, that the electors should be chosen by the same persons, by whom it is contended, on the other side, that the senators should be chosen. The only question, then, is, whether an intermediate grade of persons, called electors, should be introduced between the senators and the people.

I beg leave to state to the house the light, in which this subject has appeared to me, on an examination which I may venture to style attentive; and to make some remarks, naturally resulting, in my opinion, from the views I have taken of it on different sides.

When I am called upon to appoint other persons to make laws for me, I do it because such an appointment is of absolute necessity; for the citizens of Pennsylvania can neither assemble nor deliberate together in one place. When I reflect, that the laws which are to be made may affect my own life, my own liberty, my own property, and the lives, liberties, properties, and prospects of others likewise, who are dearest to me, I consider the trust, which

I place in those for whom I vote to be legislators, as the greatest that one man can, in the course of the business of life, repose in another. I know none, indeed, that can be greater, except that, with which the members of this convention are now honoured; and which happens not but once, and often not once, in the successive revolutions of numerous centuries. But I console myself, that the same trust, which is committed by me, is also committed by others, who are as deeply interested in its exercise as I am. I console myself further, that those, to whom this trust is committed, are the *immediate* choice of myself, and of those others equally interested with myself.

But, by the plan before you, I am now called upon to delegate this trust in a manner, and to transfer it to a distance, which I have never experienced before—I am called upon, not to appoint legislators of my own choice, but to impower others to appoint whomsoever they shall think proper, to be legislators over me, and over those nearest to me in the different relations of life—I am called upon to do this, not only for myself, but for thousands of my constituents, who have confided to me their interests and rights in this convention.—I am called upon to do this for my constituents, and for myself, for the avowed purpose of introducing a choice, different from that which they or I would make. I say *different*; because, if the people and the electors would choose the same senators, there cannot be even a shadow of pretence for acting by the nugatory intervention of electors. I am called upon to do this, not only for the purpose of introducing a choice of senators different from that which the people would make; but for the additional purpose of introducing a new state of things and relations hitherto

unknown between the people and their legislators. On the principles of representation, as hitherto understood and practised, there was a trust, and one of the most intimate and important kind, between the people and their representatives, and a responsibility of the latter to the former. On the plan reported, that trust and that responsibility will certainly be weakened: it is doubtful whether they will not be wholly destroyed. Can a trust subsist without some mutual agreement or consent? Can responsibility, resulting from an election, operate in behalf of those who do not choose? Suppose one of the citizens, who chose an elector, who chose a senator, to expostulate with that senator concerning some part of his senatorial conduct; might not the senator retort upon him—Sir, I know not you in this business: I was not chosen a senator by you: I was chosen by ——. To them I am ready to account for what I have done. You chose them my electors: if any thing is amiss, you will please to look to them for satisfaction. For, give me leave to tell you, that I know not you nor the other people of your district in my conduct as a senator: neither you nor they chose me. The constitution, sir, supposes that neither they nor you would have chosen me, if you had been indulged with a choice; for the constitution supposes an election made by electors to be very different indeed from that which would be made by the people.—What answer could be made to this?

But if this must be styled a trust, it is certainly one of a new and of a very extraordinary nature. It may subsist not only without the will or knowledge of those from whom it originates; but, on the principles of this plan, it may subsist against their will declared in the most publick and explicit manner. Suppose a senator to behave

altogether to the dissatisfaction of a district, for which he is appointed: suppose the people unanimously inclined to remove him at the next election. Can they do it? No. Suppose them to give the most unequivocal instructions to the electors for this purpose: the electors may choose him, the instructions notwithstanding: and the senator may brave them and tell them that he will legislate for them, and make them feel all the effects of his legislative power, in spite of their unavailing efforts to the contrary.

Sir, I will consider well—I will ponder long—before I consent that legislators be introduced in a shape so very questionable. I am placed in a new situation. Permit me to view it again. I am called upon to transfer a right—the right of *immediate* representation in the legislature—a right which I have hitherto retained unalienated—a right which has never, heretofore, been transferred by the citizens of Pennsylvania. Certainly, sir, this new situation requires that I should make a solemn pause—look around me, and reflect what my constituents and I have been, and what we are likely to be.

Many honourable members of this convention are, I presume, in the same predicament with myself; both as it respects their constituents, and as it respects themselves. On every account, it is proper to weigh this subject well.

Those who advocate the plan of electors must do so, either to avoid inconveniences which cannot be avoided, or to obtain advantages which cannot be obtained, in an election by the people themselves. We are,

therefore, naturally led to institute a comparison between the two modes of election; and to estimate and balance the qualities and consequences of each.

The subject is of high and extensive importance in the theory and practice of government; and well deserves a full, a patient, and a candid investigation.

The works of human invention are progressive; and frequently are not completed, till after a slow and lengthened series of gradual improvements, remotely distant from one another both in place and in time. To the theory and practice of government this observation is applicable with peculiar justness and peculiar force. In this science, few opportunities have been given to the human mind of indulging itself in easy and unrestrained investigation: still fewer opportunities have offered of verifying and correcting investigation by experiment. An age—a succession of ages elapses, before a system of jurisprudence rises from its first rude beginnings. When we have made a little progress, and look forward, a few eminences in prospect are fondly supposed the greatest elevation we shall be obliged to ascend. But these, once gained, disclose, behind them, new and superiour degrees of excellence yet unattained. In beginning and continuing the pursuit of those arduous paths, through which this science leads us, the tracts, which we explore, point to others, which yet remain to be explored.

If the *discoveries* in government are difficult and slow; how much more arduous must it be to attain, in practice, the advantage of those discoveries, after they have been made! Of some governments, the foundation has been laid in necessity; of others, in fraud; of others, in

force; of how few, in deliberate and discerning choice! If, in their commencement, they have been so unpropitious to the principles of freedom, and to the means of happiness; shall we wonder that, in their progress, they have been equally unfavourable to advances in virtue and excellence?

Let us ransack the records of history: in all our researches, how few fair instances shall we be able to find, in which a government has been formed, whose end has been the happiness of those for whom it was designed? how few fair instances shall we be able to find, in which such a government has been administered with a steady direction towards that end?

To these considerations, we must add others, which show still further the numerous and strong obstacles, that lie in the way of improvement in jurisprudence. Government founded on improper principles, and directed to improper objects, has a powerful and pernicious bias both upon those who rule, and those who are ruled. Its bias upon the first will occasion no surprise: its bias upon the second, however surprising, is not, perhaps, less efficacious, whether we consider their sentiments or their conduct. Thus the principles of despotism become the principles of a whole nation, blinded and degraded by its destructive influence. Power, splendour, influence, prejudice, fashion, habit, pride, and meanness, are all arranged to countenance and support those principles.

When we revolve, when we compare, when we combine the remarks we have been now making; when we take a slight glance of others that might be offered; we shall be at no loss to account for the slow and small

progress, that, after a long lapse of ages, has been made in the science and practice of government.

This progress has been peculiarly slow and small in the discovery and improvement of the interesting doctrines and rules of election and representation. If government, with regard to other subjects, may be said, as with propriety it has been said, to be still in its infancy; we may well consider it, with regard to this subject, as only in its childhood. And yet this is the subject, which must form the basis of every government, that is, at once, efficient, respectable, and free. The pyramid of government—and a republican government may well receive that beautiful and solid form—should be raised to a dignified altitude: but its foundations must, of consequence, be broad, and strong, and deep. The authority, the interests, and the affections of the people at large are the only basis, on which a superstructure, proposed to be at once durable and magnificent, can be rationally erected.

Representation is the chain of communication between the people, and those to whom they have committed the exercise of the powers of government. If the materials, which form this chain, are sound and strong; I shall not be very anxious about the degree to which they are polished. But, in order to impart the true republican lustre to freemen, I know no means more efficacious, than to invite and admit them to the rights of suffrage, and to enhance, as much as possible, the value of that right.

I well know how shamefully this right, all-important as it is, has been neglected—I well know how often we

have seen the election ground, thinly frequented, or almost deserted, bear mournful testimony to the indolence or to the indifference of the electors. I well know by what frivolous causes they have sometimes been induced to forego the enjoyment of the noblest right of men. But we will indulge the fond conjecture, that this supineness has been owing neither to defect nor degeneracy in the minds and principles of our citizens, nor to ignorance or disregard of the exalted rank, to which, as citizens of a free commonwealth, they are entitled. It has been occasioned, we flatter ourselves, by the narrow point of view, in which the right of election, before the revolution, was considered; and by the few objects, to which the exercise of it was directed. Before that event, the doctrine and the exercise of authority by representation was confined in Pennsylvania, as in England, to one branch of one of the great powers, into which we have seen government divided: and over even that branch a double negative was held suspended by two powers, neither of them professing to derive their authority from the people. Our surprise will be diminished, and our reprehension will be softened, by reflecting, that, in this dependent situation, the ardour of citizenship was probably *damped* as well as confined. Habits, once formed and become familiar, are not soon or easily laid aside. Our customs do not always or immediately vary in proportion to the variation of their causes. Indifference to elections, once less important, has continued, though their importance has been amazingly increased. But this, we hope, will not be the case long. The magnitude of the right will, we trust, secure, in future, the merited attention to the exercise of it.

What is the right of suffrage, which we now display, to be viewed, admired, and enjoyed by our constituents? Is it to go to an obscure tavern in an obscure corner of an obscure district, and to vote, amidst the fumes of spiritous liquors, for a justice of the peace? There, indeed, no lesson would probably be learned, but that of low vice; no example would probably be shown, but that of illiberal cunning. Is it even to choose the members of one part of a legislature, the patriotick counsels and efforts of which part are liable, at every moment, to be controlled and frustrated by the negatives of other powers, independent of the authority, and indifferent, perhaps unfriendly, to the interests of the people? Here, indeed, there might be room for lessons of frigid caution, and timid prudence. It might not be thought advisable to elect a representative of bold, undissembled, and inflexible virtue: he might be obnoxious to his superiours in the other line; and, instead of averting, might provoke the exercise of their overruling power.

Of much higher import—of much more improving efficacy, is that right, which is now the object of our contemplation. It is a right to choose, in large and respectable assemblies, all the legislative, and many of the executive officers of the government; it is a right to choose those, who shall be invested with the authority and with the confidence of the people, and who may employ that authority and that confidence for the noblest interests of the commonwealth, without the apprehension of disappointment or control.

This, surely, must have a powerful tendency to open, to enlighten, to enlarge, and to exalt the mind. I cannot sufficiently express my own ideas of the dignity and value

of this right. In real majesty, an independent and unbiassed elector stands superiour to princes, addressed by the proudest titles, attended by the most magnificent retinues, and decorated with the most splendid regalia. His sovereignty is original: theirs is only derivative.

The benign influence flowing from the possession and exercise of this right deserves to be fully and clearly pointed out. The man who enjoys the right of suffrage on the extensive scale which we have marked, will naturally turn his attention to the contemplation of publick men and publick measures. The inquiries he will make, the information he will receive, and his own reflections on both will afford a beneficial and amusing employment to his mind. I am far from insinuating that every citizen should be an enthusiast in politicks, or that the interests of himself, his family, and those who depend on him for their comfortable situation in life, should be absorbed in Quixote speculations about the management or the reformation of the state. But there is surely a golden mean in things; and there can be no real incompatibility between the discharge of one's publick and that of his private duty. Let private industry receive the warmest encouragement; for it is the basis of publick happiness. But must the bow of honest industry be always bent? At no moment shall a little relaxation be allowed? That relaxation, if properly directed, may prove to be instructive as well as agreeable. It may consist in reading a newspaper, or in conversing with a fellow citizen. May not the newspaper convey some interesting intelligence, or contain some useful essay? For all newspapers are not dedicated to the demon of slander. May not the conversation take a pleasing and an improving turn? Many hours, I believe, are every where spent in talking about the unimportant occurrences

of the day or in the neighbourhood; and, perhaps, the frailties or the involuntary imperfections of a neighbour form too often one of the sweet but poisonous ingredients of the discourse. Would it be any great detriment to society or to individuals, if other characters, and with different views, were brought upon the carpet?

At every election, a number of important appointments must be made. To do this, is, indeed, the business of a day. But it ought to be the business of much more than a day to be prepared for doing it well. When a citizen elects to office—give me leave to repeat it—he performs an act of the first political consequence. He should be employed, on every convenient occasion, in making researches after proper persons for filling the different departments of power; in discussing, with his neighbours and fellow citizens, the qualities that should be possessed by those who fill the several offices; and in acquiring information, with the spirit of manly candour, concerning the manners, and history, and characters of those, who are likely to be candidates for the publick choice. A habit of conversing and reflecting on these subjects, and of governing his actions by the result of his deliberations, will form, in the mind of the citizen, a uniform, a strong, and a lively sensibility to the interests of his country. The same causes will produce a warm and an enlightened attachment to those, who are best fitted and best disposed to support and advance those interests.

By these means, and in this manner, pure and genuine patriotism—that kind, which consists in liberal investigation and disinterested conduct—is produced, cherished, and strengthened in the mind: by these means, and in

this manner, the warm and generous emotion glows and is reflected from breast to breast.

Investigations of this nature would be useful and improving not to their authors only: they would be so to their objects likewise. The love of honest and well-earned fame is deeply rooted in honest and susceptible minds. Can there be a stronger incentive to the energy of this passion, than the hope of becoming the object of wellfounded and distinguishing applause? Can there be a more complete gratification of this passion, than the satisfaction of knowing that this applause is given—that it is given upon the most honourable principles, and acquired by the most honourable pursuits? To souls truly ingenuous, indiscriminate praise, misplaced praise, flattering praise, interested praise have no bewitching charms. But when publick approbation is the result of publick discernment, it must be highly pleasing to those who give, and to those who receive it.

Let us now review a little the steps we have trod: let us reconsider the ground we have passed over, and the observations we have made. Have I painted the rights of election in colours too flattering?—Have I placed their importance in a light too strong?—Have I described their influence in language, or in sentiments, that have been exaggerated? I presume that I have not.

If, then, the remarks which I have made, and the deductions which I have drawn, will bear—and I trust they will bear—the test of strict and sober scrutiny; what is the result necessarily flowing from the whole? It is undeniably this—that the rights of suffrage, properly

understood, properly valued, properly cultivated, and properly exercised, is a rich mine of intelligence and patriotism—that it is an abundant source of the most rational, the most improving, and the most endearing connexion among the citizens—and that it is a most powerful, and, at the same time, a most pleasing bond of union between the citizens, and those whom they select for the different offices and departments of government.

If these things are so; why should this right, so valuable and important, the cause of so many blessings, moral, intellectual, and political, be weakened—why should it be interrupted by the interjection of electors? Reasons irresistibly cogent will certainly be urged and supported, before such a measure will be adopted by the members of this convention.

It has been already mentioned, that those who advocate the plan of electors must do so, either to avoid inconveniences which cannot be avoided, or to obtain advantages which cannot be obtained, in an election by the people. What inconveniences will be avoided?

Will the meetings of the people be less frequent, less troublesome, or less expensive in choosing electors than in choosing senators? In respect both of frequency and of trouble they will be precisely the same. In respect of expense, the inconvenience will be increased by choosing electors; for it will be but reasonable that an allowance be made to them for their time, their trouble, and their services. In these respects, therefore, no inconvenience will be avoided, but an inconvenience will be incurred, by choosing electors.

Will inconveniences respecting the objects of choice attend elections by the people, and be avoided in elections by electors? What are those inconveniences?

Will the choice of the people be less valid than the choice of electors? That will not be pretended, since the electors themselves will derive *all* their authority from the people.

Will the choice of the people be less honourable than the choice of electors? In republican governments, the people are the fountain of honour as well as of power.

Will the choice of the people be less disinterested than the choice of electors? Interest will probably be consulted in both choices: but, in the first, the interests of the individuals, added together, will form precisely the aggregate interest of the whole; whereas, in the last, the interests of the electors, added together, will form but a small part of the interests of the whole; and that small part may be altogether unattached, nay, it may be altogether repugnant, to the remainder.

Will the choice of the people be less impartial than the choice of electors? The answer to this question is determined by the answer to the last. An impartial choice, in the case before us, is a choice that embraces the interests of the whole; a partial choice is that which embraces the interests only of a part. A choice by the people is most likely to suit the first description: a choice by electors is most likely to suit the last.

Will the choice of the people be made with less solicitude and fewer precautions for their common advantage than the choice of electors? If every individual among the people attends to his own advantage; the common advantage, which is the joint result of the whole, will be provided for. But every elector may be very attentive to his own advantage; and yet the common advantage may be left wholly unprovided for.

Will the choice of the people be less wise than the choice of electors? We have already seen that it will not be less valid, nor less honourable, nor less disinterested, nor less impartial, nor less for the common advantage: having seen all this, we may pronounce the presumption to be violent, that it will not be less wise. Upon this presumption we shall leave the matter for the present.

Permit me to observe, in the mean time, that inconveniences unavoidable in elections by the people, but altogether foreign from elections by electors, ought to be shown clearly and undeniably on the other side.

The next inquiry is—what advantages can be obtained in elections by electors, that are unattainable in elections by the people.

This side of the inquiry is, in my view, very much anticipated by the discussion of the other side: indeed it appears to me wholly unproductive. To those who think and speak in favour of electors, it may disclose sources of abundant fertility: to their investigations and discoveries I cheerfully leave it; observing, under this

head, that the advantages to be gained, as well as the inconveniences to be avoided, ought to be shown clearly and undeniably on the other side. For if, upon the whole, the balance shall hang in equilibrio; the predilection, for the strong reason already mentioned, will certainly be in favour of a choice by the people themselves, and not by electors.

This predilection ought to operate for another reason, which has not yet been mentioned. It will be cheerfully admitted, that all power is originally in the people: the consequence, unavoidable, is, that power ought to be exercised personally by the people, when this can be done without inconvenience and without disadvantage. In some of the small republicks of Greece, and in the first ages of the commonwealth of Rome, the people voted, even on the passing of laws, in their aggregate capacity. Among the ancient Germans this was also done upon great occasions. "De minoribus consultant principes," says Tacitus, in his masterly account of Germany, "de majoribus omnes." And from the practices of the ancient Germans, some of the finest maxims of modern government are drawn. If, therefore, no inconvenience will be avoided, and no advantage will be obtained by the plan of electors—and this is the case, so far as we have yet seen—that plan should not be substituted in the place of a choice of senators by the people themselves.

Were we to satisfy ourselves with this partial and incomplete consideration of the subject; I apprehend we should be extremely unwilling to transfer the choice of senators from the people to electors. But if we pursue the examination a little further, we shall find still stronger reasons for this reluctance: for we shall find,

I believe, that, by such a transfer, instead of avoiding inconveniences and obtaining advantages, we shall sacrifice advantages for the acquisition of inconveniences.

The political connexion between the people and those whom they distinguish by elective offices, and the reciprocal sensations and engagements resulting from that connexion, I consider as most interesting in their nature, and most momentous in their consequences. This connexion should be as intimate as possible: if possible, it should be indissoluble. Confidence—mutual and endearing confidence—between those who impart power and those to whom power is imparted, is the brightest gem in the diadem of a republick. Let us sedulously avoid every danger of its being broken or lost.

Will there be the same generous emotions of confidence in the body of citizens towards the senators?—Will there be the same warm effusions of gratitude in the senators towards the body of the citizens, if the cold breath of electors is suffered to blow between them? Can the senator say to the people—you are my constituents; for you chose me? Can the people say to the senator—you are our trustee, for you are the object of our choice? Will not these relations, equally delightful and attractive on both sides, be greatly weakened—will not their influence be greatly diminished, by the interposition of electors?

But let us contemplate this subject in a still more serious and important point of view. The great desideratum in politicks is, to form a government, that will, at the same time, deserve the seemingly opposite epithets —efficient and free. I am sanguine enough to think that

this can be done. But, I think, it can be done only by forming a popular government. To render government efficient, powers must be given liberally: to render it free as well as efficient, those powers must be drawn from the people, as directly and as immediately as possible. Every degree of removal is attended with a corresponding degree of danger. I know that removals, or at least one removal, is, in many instances, necessary in the executive and judicial departments. But is this a reason for multiplying or lengthening them without necessity? Is it a reason for introducing them into the legislative department, the most powerful, and, if ill constituted, the most dangerous, of all? No. But it is a strong reason for excluding them wherever they can be excluded; and for shortening them as much as possible wherever they necessarily take place. Corruption and putridity are more to be dreaded from the length, than from the strength, of the streams of authority.

On this great subject, I offer my sentiments, as it is my duty to do, without reserve. I think—that all the officers in the legislative department should be the immediate choice of the people—that only one removal should take place in the officers of the executive and judicial departments—and that, in this last department, a very important share of the business should be transacted by the people themselves.

These are, in a few words, the great outlines of the government, which I would choose. I fondly flatter myself that all the parts of it might be safely, compactly, and firmly knit together; and that the qualities of goodness, wisdom, and energy might animate, sustain, and pervade the whole.

And for what should we sacrifice all the valuable connexions, principles, and advantages, which have been mentioned? For electors?—Who are those electors to be? Logicians sometimes describe the subjects of their profound lucubrations negatively as well as positively. Let us borrow a hint from them, on this occasion. Who are those electors *not* to be? 1. They will be such as the people will think not the fittest to represent them in the most numerous branch of the legislature; for no representatives can be electors. 2. They will be such as the people will think not the fittest to be senators; for no elector can be a senator; and therefore the people will not choose those to be electors, whom they would wish to see in the senate. 3. They will be such as the governour *has* thought not the fittest for any office in the executive or judicial departments; for persons holding appointments in any of those departments cannot be electors. I was going to say, in the fourth place, that they will be such as will be thought not the fittest for any office under the executive department in future. But here, I find, I am mistaken. For they may hold offices the moment after their election of senators; and I will not assert it to be impossible, that they will acquire their qualifications for those offices by their conduct in that election.

Thus far we have pursued their negative descriptions. The task of expatiating on their positive qualities, I beg leave, for the present, to assign to those who must be supposed to understand them much better. For they must certainly know well the purifying virtues of those political alembicks, through which they wish to see our senators sublimated and refined.

Among the numerous good qualities of the electors, we hope, one will be—that they will be unsusceptible of

intrigue or cabal among themselves. A second, we hope, will be—that they will be inaccessible to the impressions of intrigue and cabal from others. A third, we hope, will be—that as the people, by choosing them electors, have intimated decently that they think *them* not the fittest persons to be senators, *they* will cultivate the same decent reserve with regard to their brothers, their cousins, their other relations, their friends, their dependents, and their patrons.

# SPEECH

DELIVERED, ON 19th JANUARY, 1790,

## IN THE CONVENTION OF PENNSYLVANIA,

ASSEMBLED FOR THE PURPOSE OF REVIEWING, ALTERING, AND AMENDING THE CONSTITUTION OF THE STATE;

ON A MOTION THAT

"NO MEMBER OF CONGRESS FROM THIS STATE, NOR ANY PERSON HOLDING OR EXERCISING ANY OFFICE OF TRUST OR PROFIT UNDER THE UNITED STATES, SHALL, AT THE SAME TIME, HOLD AND EXERCISE ANY OFFICE WHATEVER IN THIS STATE."

# SPEECH IN CONVENTION,

## ON 19th JANUARY, 1790.

IT has frequently been my lot to plead the cause of others; sometimes of individuals, sometimes of publick bodies, oftener than once of the commonwealth of Pennsylvania. It is now my lot to be under the hard necessity of pleading my own. That commonwealth, whose cause I have pleaded—and pleaded successfully—that commonwealth, in whose service I have laboured faithfully—I defy even my enemies to refute the assertion—though, to myself, very unprofitably—that commonwealth, which I have served in times of safety and in times of danger, through good report, and through bad report—that commonwealth, sir, if the present motion shall be adopted, is about to strip me of the most valuable rights of citizenship. And this is to be done without any offence or cause of forfeiture on my part; unless to have been highly honoured by the president and senate of the United States is, in her consideration, now become

a crime, and to have accepted of the high honour is, in her eye, become a cause of forfeiture.

Well, then, may I say, that I am now to plead my own cause. All the citizen is roused within me; and I dissemble neither my feelings nor my interest: for both my interest and my feelings as a citizen of Pennsylvania assure me, in a manner which I cannot mistake, but which, at the same time, I cannot express, that this cause is personally my own. As such, therefore, I shall openly and directly consider and plead it. I am afraid, however, that I shall acquit myself but awkwardly: the task is new and unfamiliar: the path before me I have not hitherto trod. But a ray of consolation darts upon me. Though the cause is personally, it is not exclusively my own. I plead the cause likewise of some of the most distinguished citizens of Pennsylvania: I plead what will soon be the cause of others of her citizens equally distinguished: I plead what will continue, in future ages, to be the cause of her best, and those who ought to be her most favoured sons: I plead, sir, the cause of Pennsylvania herself: for Pennsylvania herself will certainly suffer, if she shall be deprived of the services of such of her citizens, as shall be best qualified for serving her. To deprive her of the services of such citizens is the evident tendency, the evident object, and the evident principle of the present motion: for such will be the citizens selected for the offices of the United States.

But here, sir, I must beg not to be misunderstood. When I speak of the principle and object and tendency of the motion, I mean not to apply those expressions to the principles, the views, or the wishes of its honourable

mover. Between the first and the last there may be, and, I think, there probably is, a very considerable difference. In suggesting this, I pay not, to his principles, a compliment at the expense of his understanding; for to the most enlightened mind it is no disparagement to suppose, that, at first sight, it does not perceive all the distant bearings and relations and dependencies, which a motion, especially one so extensive as this, may, on investigation, be found to have.

The motion is in these words: "No member of congress from this state, nor any person holding or exercising any office of trust or profit under the United States, shall at the same time, hold and exercise any office whatever in this state." It embraces all this broad and comprehensive position—every person, who is employed or trusted by the United States, ought, for that reason, to be incapacitated from being employed or trusted by the commonwealth of Pennsylvania, one of those states who compose the union. This position, your adoption of the motion will establish in its fullest force and extent. It will become a part, not merely of the law, but of the constitution of the land; and will be a binding and perpetual rule for the future conduct of this commonwealth. This, sir, and nothing short of this, is the true and necessary import of the question before you.

It is not, that some offices under the United States may, in point of propriety, or in point of policy, in the nature of their exercise, or in the place where they are exercised, be inconsistent with some offices under Pennsylvania. This, I will readily admit, may be the case under those different governments. It has been

admitted to be the case in an instance already agreed to without opposition—I mean that of the governour. This may often be the case with regard to different offices even under the same government. Of this there are many examples in the system before you. They have encountered no disapprobation from me or any other member.

Again: the position, in the motion before you, is not, that it would be inconsistent or improper for the same person to hold, in any case, more offices than one. No, sir: this motion may be adopted, and yet one person may have twenty different offices accumulated upon him under this very constitution. For the position is not, "that no person, holding any one office, shall, at the same time, hold any other office, under this state:" but the position is, "that every person, holding an office under the United States, should be excluded from every office whatsoever in this state." For this reason, sir, all the numerous observations, which we heard on Saturday, from the honourable mover, concerning the profuse and improvident donations of offices, which the people, in a fit of fondness, might heap on the head of a popular favourite, however they might suit other purposes, were evidently beside the purpose of the motion. The motion, though adopted, will not prevent, nor is it calculated to prevent, such thoughtless and injudicious accumulations.

I have always flattered myself, that the constitution of the United States would be a bond of union, and not a principle of inveterate alienage, far less of hostility, between the several states; certainly and more particularly, between each of them and the United States. "A more perfect union" is declared to be one end of that

constitution. That constitution, I believe, was intended to be the centre of attraction for that "more perfect union." Shall we convert that constitution, as far as it can depend on Pennsylvania—fortunately for the union, we can convert it no farther—into a principle of repulsion? If that is the design of this committee; if that is an object, for the accomplishment of which our constituents sent us here; the motion before you is well fitted for fulfilling that design; it is well fitted for accomplishing that object. Under the operation of this motion, if the government of the United States shall hereafter distinguish a citizen of Pennsylvania with an "office of profit or trust;" that government must become, however reluctantly, the repulsive agent in destroying the better half of his right of citizenship; and, consequently, of diminishing, by the better half, his political connexion with this commonwealth.

This, sir, is no inflated or exaggerated representation of the matter: the account is strictly and severely true. The right of citizenship consists in these two things: 1. A right to elect. 2. A right to be elected into office. Of the two, the last is certainly not the least valuable or important. Of the last I shall be deprived by your adoption of the motion before you. I call for the principles and reasons of deprivation. I demand, sir—for I have a right to demand—from the justice of this committee, that those principles and reasons be clearly shown and incontestably proved, before the sentence of deprivation be passed against me. I think I heard, on Saturday, an opinion mentioned as being decidedly formed. I trust that the expression was used inadvertently: I trust that the honourable members of

this committee will hear, and weigh, and consider, before they decide.

Believe me, sir, the principle, more than any foreseen consequence, of disfranchisement wounds and alarms me. We are told in history, that a person, whose inclination had never led him beyond the gates of Rome, sickened and died, when Augustus, in a wanton trick of his absolute power, confined him within those very limits, beyond which he had never previously wished to go. 'Tis one thing, sir, to be without an office: 'tis a very different thing to be disqualified from holding an office, and to wander about like a person attainted and cut off from the community. The first is often the effect of choice: the last never is; it is the result of dire necessity. The idea of disqualification is a most mortifying idea, when applied by one to himself: it is a most insulting idea, when applied to him by others. And can you think, sir, that I would wish to become or continue the constant mark of mortification or insult? No, sir; I can, at least, comfort myself, that I will not be reduced to this situation. The motion of the honourable gentleman is not armed—fortunately it cannot be armed—with the sting of the edict of Augustus: it may prompt me to go; but it cannot compel me to stay. I can cross the Delaware. In New Jersey, I shall be received as a citizen—a full citizen—of the state; and, at the same time, may hold a dignified and important office under the United States. What I say concerning New Jersey, I may say concerning New Hampshire, Massachussetts, Connecticut, New York, Delaware, Maryland, North Carolina, South Carolina, and Georgia. For none of those states, so far as I know or have been informed, view honourable employments under the national government through the inverted spe-

culum of the motion, which presents them as causes of disqualification and disfranchisement. Nay, sir, I believe I can go to Rhode Island, and be received there as more than a half citizen, if I choose it; for I have not heard, that that state, antifederal as it is, has passed an act of incapacity against the officers of the United States.

But we are told, that the commonwealth of Virginia has observed a different conduct; and has exhibited an example, which we are now solicited to imitate. I wish, sir, to know if this favourite example forms a part of the constitution of Virginia. If it does not—and I presume it does not—I wish to see the law that has produced it: I wish to examine that law: I wish to know the reason of that law: I wish to know the time when, and the occasion on which, that law was made: I wish to know the temper and the *national* principles of the legislature, which made that law. I have been informed, how correctly I will not undertake to vouch, that an antifederal leader in Virginia, foiled by the convention of that commonwealth in his opposition to the national government, introduced into the legislature, and succeeded in fixing some stigma, as far as that legislature could fix a stigma, upon the federal characters of that state. Perhaps, sir, my information is correct; and this law may be the very thing. Perhaps, sir, it may have been the production of the convulsive throes of an antifederal fit. If so—and I think the conjecture a probable one—so soon as the fit shall be over—and, I hope, it will be over soon, if it is not over already—Virginia will remove its effects by considerately repealing the law, which it had precipitately occasioned.

But shall we, sir, suffer ourselves to become infected with the transient, though violent disorder of a neighbouring state? Shall we do more, sir?—shall we inoculate this disorder to become a perpetual and incurable poison in the very vitals of our constitution? I confess I did not expect to see the symptoms of this distemper reappear so soon in Pennsylvania, after all the successful efforts that have been made to expel them from her borders.

It seems that I ought to be incapacitated from enjoying the confidence of this state, while I hold an office under the United States. And yet I may hold *one* office in this state, and not be incapacitated from holding twenty or thirty more. And yet I may hold an office under New Jersey, and not be incapacitated. I may hold an office under *any* other, and even under *every* other state in the Union, and not be incapacitated. I may hold an office under France, under any other state in Europe, under any other state in the world, and not be incapacitated. I may have held an office under Great Britain, and, under that office, may have acted against the United States and against this state, during all the late war; I may still hold that very office, and not be incapacitated. But—the position occurs again—if I hold an office under the United States, I must be incapacitated from any trust under Pennsylvania.

Whence, sir?—in the name of wonder—whence this principle of hostility—this principle of hostility, operating solely and peculiarly—between this commonwealth and the United States? Let it be explained: let us know its origin: let us know its nature: let us know its extent: let us know its effects.

If this principle exists, and ought to be provided against; it is surprising that no such provision was made

or recommended against it, by the general convention, formed of members from all the states in the Union—a convention, which, I believe, understood the interests of the Union and of all its parts. If it ought to be a part of our constitution that "no person, holding any office "under the United States, shall, at the same time, hold "any office in this state;" it ought to have been a part of the constitution of the United States, that "no person, "holding any office under Pennsylvania, or any other "state in the Union, shall, at the same time, hold any "office in the national government." But no such part is to be found in that constitution. We may presume—I suggest it with deference—we may presume, that the whole knew the proper connexion between itself and its parts; and provided for the preservation, the strength, and the limits of that connexion, as well as *one* of the parts can know and provide for the preservation, the strength, and the limits of its connexion with the whole. But no such provision as this is made by those, who had the whole state of the Union before them: the inference is fair, that this provision is dictated, not by a general and comprehensive, but by a partial and contracted view of the subject.

Will the principle of this motion contribute to preserve or to strengthen the political connexion between the United States and the commonwealth of Pennsylvania? Will it not, on the other hand, contribute to weaken, to interrupt, or to dissolve it? The principle of this motion, sir, is a principle of political alienage: I go farther—it contains a declaration of political hostility by this commonwealth against the United States. It declares that this commonwealth ought not to trust or employ any person, whom the United States have thought worthy of

trust or employment. On what foundation can such a declaration rest? It can have no reasonable foundation, unless the interests and views of the United States are, in their nature and tendency, hostile to the interests and views of this commonwealth. Let it be shown wherein this hostility of views and interests consists.

I have already admitted, that there are many instances, in which offices under different governments are incompatible in point of propriety, or in point of policy, in the nature of their exercise, or in the place where they are exercised. I have admitted also, that an accumulation of offices may be very improper under the same government. But it has appeared, that the principle, the tendency, and the object of this motion are not to prevent any incompatibilities or improprieties of these kinds.

On the other hand, there are many instances, in which different offices, not only under the same government, but even under different governments, may be held, not only with great propriety, but even with great advantage to the publick, by the same persons. Against the enjoyment of this publick advantage, the motion before you is levelled and directed.

And yet, sir, our own experience has attested its happy effects. During the late war, we reaped solid benefits from the exertions and talents of officers—in one instance, of a very distinguished officer—in the service of France. Would we have reaped those benefits, had France adopted, against the United States, the unfriendly principle, which is now recommended to a state, hitherto one of the most federal and one of the most affectionate in the Union? Suppose the sovereign of those officers to have declared

to them in the spirit of this motion—"the moment you "accept any office under the United States, you shall be "disqualified, by that acceptance, from holding any office "in my service,"—what would have been the consequence? The United States would have been deprived of their military skill and assistance. But, happily for us, the king of France was not actuated by the spirit of this motion: shall I risk the expression, that he was more federal?

On how many sudden and unforeseen emergencies may the services of a stated officer of the United States be useful, perhaps, in the opinion of the publick, necessary for this commonwealth! On how many sudden and unforeseen emergencies may the services of a stated officer of this commonwealth be useful, perhaps, in the opinion of the publick, necessary for the United States? Why, in both cases, should the door of mutual, useful, necessary, and patriotick exertion be constitutionally shut? For this motion will operate both ways. If the officers of the United States are to be considered as aliens with regard to their capacity of holding offices under this commonwealth: the officers of this commonwealth must be considered as aliens with regard to their capacity of holding offices under the United States.

When I say, sir, that, in both instances, they must be considered as aliens; I use an expression much too soft: for under both constitutions—that of the United States and that which we propose—aliens may be employed in many offices. This motion, if adopted, will, therefore, introduce, between the United States, and this state, as to offices, more than a state of alienage. I was justified in saying, that this motion contained a

principle and declaration of political hostility, as to offices, between this commonwealth and the United State. Before the sentence of disfranchisement from office in Pennsylvania be passed, by the adoption of this motion, against the officers of the United States; I again demand that it be clearly shown wherein the principle of political hostility between the two governments consists.

I think it has been suggested, that unless the principle of this motion be introduced into the constitution, the government of the United States may acquire, in Pennsylvania, an influence dangerous to her counsels, dangerous to her interests, and dangerous even to her existence. That government, it was supposed, might, by appointing to its offices the officers of this state, attach them to the measures, the interests, and the counsels of the United States, in opposition to the measures, the interests, and the counsels of Pennsylvania. Like the motion, this reasoning in support of it is founded on an implied principle of hostility between the two governments. Before the committee subscribe to the reasoning, they will require that the principle of hostility be shown.

But let us, for a moment, suppose it to exist: let us suppose that the measures, and interests, and counsels of the United States are in diametrical and inveterate opposition to those of Pennsylvania: let us suppose, that, in order to promote those adverse interests, to establish those adverse counsels, and to carry into effect those adverse measures, the president and senate of the United States should call to their aid, and associate in their designs, the officers of Pennsylvania; would it be politick or wise in Pennsylvania to cooperate, in the most effectual manner, with the president and senate for

the accomplishment of their plans? Could she do this more effectually by any means, than by detaching from her all the officers of the state, whom the president and senate would wish to attach to them? Could she detach them from her more effectually by any means, than by disfranchising them from their offices, and by treating them as aliens, nay, worse than aliens? Could she do this more effectually by any means, than by cutting asunder the strongest ties of political connexion and political affection between her and them?

I believe, sir, you may hear, from some states, a series of reasoning, very opposite to that before mentioned: you may hear a train of reflection to the following purpose: What! shall we part with the interests, with the affections, and with the services of our citizens, because they are called into the service of the United States? No. Let us retain their interests; for their interests will be ours: let us retain their affections; for these, at least, may remain with us: let us retain their services, as far as they shall be compatible—and, in many instances, they will be compatible—with their superiour duty to the United States.

Whether this train of reflection and reasoning be just and strong, I shall not pretend to determine. I shall only observe, that, as far as I know, the conduct of every state in the union has been consonant to it, excepting only that of the commonwealth of Virginia—and shall I, after some time, be obliged to make the cruel addition—and excepting likewise that of the commonwealth of Pennsylvania?

'Tis possible, sir, though I will not allow it to be probable, that this cruel addition must be made. 'Tis

possible, though, again, I will not allow it to be probable, that Pennsylvania may become as infamous for her anti-federal, as she has hitherto been renowned for her federal principles. 'Tis possible, though, still, I will not allow it to be probable, that she may hereafter be as much dishonoured by the littleness, as she has heretofore been admired for the liberality, of her politicks. Her counsels may take an inverted and diminishing turn. Those, sir, who cannot shine in a spacious sphere, will wish to draw some notice in a contracted one. Those, who cannot be distinguished by acting a part in an enlarged system, will endeavour to distinguish themselves by acting as the little but principal puppets in a narrow and separated scene. Into such hands, sir, it is possible—though I once more enter my protest against the probability of the event,—that Pennsylvania, for her sins, may fall.

If this very improbable, but very possible event should take place; then, indeed, the cruel addition, which I have already mentioned, must be made. Yet even then, this cruel circumstance would carry with it, in some degree, its own alleviation. In such a circumstance, the pangs of separation from Pennsylvania would become less severe. Even in such a circumstance, I hope one consolation might be constitutionally allowed me. On my way to the government of the United States, I might turn and look back from the opposite shore of the Delaware; and though Pennsylvania should reject my faithful services, she might permit me, with a fluttering heart and faultering tongue, to wish her well.

But, sir, I will not pursue the consideration of an event so irreconcilable with the present genius and

principles of Pennsylvania. Is *she* jealous, because her sons are received into the arms of the United States? No, sir. Was she to open her lips upon this occasion, we should hear the following, or some such as the following, accents: "Though I cheerfully resign you to "the service of the Union, in which my own service "is, to many important purposes, included; yet I "renounce not your affections; nor do I abdicate my "well founded claim to your duty. You may still be "of use to me; and I retain my right to the exertions "of your usefulness, whenever I shall call upon you on "a proper occasion. In the mean time, employ your "utmost efforts for the interest of the United States: "by doing this, you will essentially promote mine; and "you will be likewise better prepared, and better dis-"posed for serving me, whenever I shall particularly "require your service." Such would be the language, such would be the sentiments, of our venerable political parent. Such, sir, without personification, and without an allegory, I believe to be literally and strictly the language and sentiments of a great majority of the people of this commonwealth. This language and these sentiments are in direct contradiction to the language and principles of the motion before you. To which will this committee pay the greatest regard?

# A CHARGE

DELIVERED

TO THE GRAND JURY

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF VIRGINIA,

IN MAY, 1791.

# A CHARGE

## TO THE GRAND JURY

### IN THE

## CIRCUIT COURT FOR THE DISTRICT OF VIRGINIA.

GENTLEMEN OF THE GRAND JURY,

To prevent crimes is the noblest end and aim of criminal jurisprudence. To punish them is one of the means necessary for the accomplishment of this noble end and aim. The impunity of an offender encourages him to repeat his offences. The witnesses of his impunity are tempted to become his disciples in his guilt. These considerations form the strongest—some view them as the sole argument for the infliction of punishments by human laws.

There are, in punishments, three qualities, which render them the fit preventives of crimes. The first is their moderation. The second is their speediness. The third is their certainty.

We are told by some writers, that the number of crimes is unquestionably diminished by the severity of

punishments. If we inspect the greatest part of the criminal codes; their unwieldy bulk and their ensanguined hue will force us to acknowledge, that this opinion may plead, in its favour, a very high antiquity, and a very extensive reception. On accurate and unbiassed examination, however, it will appear to be an opinion unfounded and pernicious, inconsistent with the principles of our nature, and, by a necessary consequence, with those of wise and good government.

So far as any sentiment of generous sympathy is suffered, by a merciless code, to remain among the citizens, their abhorrence of crimes is, by the barbarous exhibitions of human agony, sunk in their commiseration of criminals. These barbarous exhibitions are productive of another bad effect—a latent and gradual, but a powerful, because a natural, aversion to the laws. Can laws, which are a natural and a just object of aversion, receive a cheerful obedience, or secure a regular and uniform execution? The expectation is forbidden by some of the strongest principles in the human frame. Such laws, while they excite the compassion of society for those who suffer, rouse its indignation against those who are active in the steps preparatory to their sufferings.

We may easily conjecture the result of those combined emotions, operating vigorously in concert. The criminal will, probably, be dismissed without prosecution by those whom he has injured. If prosecuted and tried, the jury will probably find, or think they find, some decent ground, on which they may be justified, or at least excused, in giving a verdict of acquittal. If convicted, the judges will, with avidity, receive and support every, the nicest exception to the proceedings against

him; and, if all other things should fail, will have recourse to the last expedient within their reach for exempting him from rigorous punishment—that of recommending him to the mercy of the pardoning power. In this manner, the acerbity of punishment deadens the execution of the law.

The criminal, pardoned, repeats the crime, under the expectation that the impunity also will be repeated. The habits of vice and depravity are gradually formed within him. Those habits acquire, by exercise, continued accessions of strength and inveteracy. In the progress of his career, he is led to engage in some desperate attempt. From one desperate attempt he boldly proceeds to another, till, at last, he necessarily becomes the victim of that preposterous rigour, which repeated impunity had taught him to despise, because it had persuaded him that he might always escape.

When, on the other hand, punishments are moderate and mild, every one will, from a sense of interest and of duty, take his proper part in detecting, in exposing, in trying, and in passing sentence on crimes. The consequence will be, that criminals will seldom elude the vigilance, or baffle the energy, of publick justice.

True it is, that, on some emergencies, excesses of a temporary nature may receive a sudden check from rigorous penalties: but their continuance and their frequency introduce and diffuse a hardened insensibility among the citizens; and this insensibility, in its turn, gives occasion or pretence to the farther extension and multiplication of those penalties. Thus one degree of severity opens and smooths the way for another, till, at

length, under the specious appearance of necessary justice, a system of cruelty is established by law.

Such a system is calculated to eradicate all the manly sentiments of the soul, and to substitute, in their place, dispositions of the most depraved and degrading kind. It is the parent of *pusillanimity*. A nation broke to cruel punishments becomes dastardly and contemptible. For, in nations, as well as individuals, cruelty is always attended by cowardice. It is the parent of *slavery*. In every government, we find the genius of freedom depressed in proportion to the sanguinary spirit of the laws. It is hostile to the prosperity of nations, as well as to the dignity and virtue of men. The laws, which Draco framed for Athens, are said emphatically to have been written in blood. What did they produce? An aggravation of those very calamities, which they were intended to remove. A scene of the greatest and most complicated distress was accordingly exhibited by the miserable Athenians, till they found relief in the wisdom and moderation of Solon. It is a standing observation in China—and China has enjoyed a very long experience—that in proportion as the punishments of criminals are increased, the empire approaches to a new revolution. The Porcian law provided, that no citizen of Rome should be exposed to a sentence of death. Under the Porcian law, the commonwealth grew and flourished. Severe punishments were established by the emperours. Under the emperours, Rome declined and fell.

The principles both of utility and of justice require, that the commission of a crime should be followed by a speedy infliction of its punishment.

The association of ideas has vast power over the sentiments, the passions, and the conduct of men. When a penalty marches close in the rear of the offence, against which it is denounced; an association, strong and striking, is produced between them: and they are viewed in the inseparable relation of cause and effect. When, on the contrary, the punishment is procrastinated to a remote period; this connexion is considered as weak and precarious; and the execution of the law is beheld and suffered as a detached instance of severity, warranted by no cogent reason, and springing from no laudable motive.

It is just, as well as useful, that the punishment should be inflicted soon after the commission of the crime. It should never be forgotten, that imprisonment, though often necessary for the safe custody of the person accused, is, nevertheless, in itself, a punishment—a punishment galling to some of the finest feelings of the heart—a punishment too, which, since it precedes conviction, may be as undeserved as it is distressing. But imprisonment is not the only penalty, which an accused person undergoes before his trial. He undergoes also the corroding torment of suspense—the keenest agony, perhaps, which falls to the lot of suffering humanity. This agony is by no means to be estimated by the real probability or danger of conviction: it bears a compound proportion to the delicacy of sentiment and the strength of imagination possessed by him, who is doomed to become its prey.

These observations show, that those accused of crimes should be speedily tried, and that those convicted of them should be speedily punished. But with regard to this, as with regard to almost every other subject, there

is an extreme on one hand as well as on the other; and the extremes on each hand should be avoided with equal care. In some cases, at some times, and under some circumstances, a delay of the trial and of the punishment, instead of being hurtful or pernicious, may, in the highest degree, be salutary and beneficial, both to the publick, and to him who is accused or convicted.

Prejudices may naturally arise, or may be artfully fomented, against the crime, or against the man who is charged with having committed it. A delay should be allowed, that those prejudices may subside, and that neither jurors nor judges may, at the trial, act under the fascinating impression of sentiments conceived before the evidence is heard, instead of the calm influence of those which should be only its impartial and deliberate result. A sufficient time should be given to prepare the prosecution on the part of the state, and the defence of it on the part of the prisoner. This time must vary according to different persons, different crimes, and different situations.

After conviction, the punishment assigned to an inferiour offence should be inflicted with much expedition. This will strengthen the useful association between them; one appearing as the immediate and unavoidable consequence of the other. When a sentence of death is pronounced, such an interval should be permitted to elapse before its execution as will render the language of political expediency consonant to the language of religion.

Under these qualifications, the speedy punishment of crimes should form a part in every system of criminal jurisprudence.

But the certainty of punishments is that quality, which is of the greatest importance in order to constitute them fit preventives of crimes. This quality is, in its operation, most merciful as well as most powerful. When a criminal determines on the commission of a crime, he is not so much influenced by the lenity of the punishment, as by the expectation that, in some way or other, he may be fortunate enough to avoid it. This is particularly the case with him, when this expectation is cherished by examples or by experience of impunity. It was the saying of Solon, that he had completed his system of laws by the combined energy of justice and strength. By this expression he meant to denote, that laws, of themselves, would be of very little service, unless they were enforced by a faithful and an effectual execution of them. The strict execution of every *criminal* law is the dictate of humanity as well as of wisdom.

This strict execution is greatly promoted by accuracy in the publick police, by vigilance and activity in the ministerial officers of justice, by a prompt and regular communication of intelligence, and by a proper distribution of rewards for the discovery and apprehension of criminals.

Among all the plans and establishments, however, which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution is, at least in the present times, the peculiar boast of the common law. The era of its commencement, and the particulars attending its gradual progress and improvement, are concealed behind the thick veil of a very remote antiquity. But one thing concerning it is

certain. In the annals of the world, there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigour, from negligence, or from partiality in the prosecution of crimes.

Among the Romans, any one of the citizens, as well as the person more immediately injured, might prosecute a publick offence. This practice produced mischiefs very great, and of very opposite kinds. Prosecutions were conducted, on some occasions, from motives of rancour and revenge. On other occasions, they were undertaken by a friend, perhaps a confederate of the criminal, with a view to ensure his impunity.

In several of the *feudal* nations, the judge himself was originally the prosecutor. The gross impropriety of such a regulation appears at the first view. The prosecutor is a party: can the same person be both a party and a judge? To remove the grievances, to which this regulation gave birth, a publick prosecutor was appointed to manage the judicial business of the crown, or of the community, before the proper tribunals.

But that crimes may be prosecuted duly and regularly, it is necessary that impartial and authentick information of their existence should be obtained. To furnish such information is the great object of the institution of grand juries.

Sometimes the grand jury bring forward accusations of their own proper motion: sometimes they proceed upon particular charges formally laid before them by the publick prosecutor. These two modes are distinguished

by the well known appellations of *presentment* and *indictment*. In both, it is the right, and it is the duty of a grand jury, to inquire diligently, and to present truly.

It is your immediate business, gentlemen, to make inquiries and give official information concerning such crimes and offences as may have been committed against the constitution and laws of the United States, and are cognizable by this circuit court held for the district of Virginia in the middle circuit. To assist you in those inquiries, I shall describe to you the jurisdiction, which, in criminal matters, is vested in the circuit courts; and I shall give you a very plain and concise account of the crimes and offences known to the constitution and laws of the United States, and of the punishments denounced against those crimes and offences.

The circuit courts have *exclusive* jurisdiction of all crimes and offences, which are cognizable under the authority of the United States, except where it is or shall be provided otherwise by law. They have also *concurrent* jurisdiction with the district courts, of the crimes and offences, which are cognizable in those courts[a]. The crimes and offences, of which the district courts have jurisdiction, and of which, consequently, the circuit courts have *concurrent* jurisdiction, are all such as are cognizable under the authority of the United States, provided they be committed within the respective districts, or on the high seas; and provided they be those on which no other punishment than a fine not exceeding one hundred dollars, imprisonment not exceed-

[a] Laws U. S. Cong. 1. sess. 1. c. 20. s. 11.

ing six months, or whipping not exceeding thirty stripes is to be inflicted.[b]

Treason generally occupies the first place in the long catalogue of crimes. On this subject, so interesting to the publick and to the citizens, a very important improvement has been ingrafted by the constitution of the United States.

If the description of treason be vague and indeterminate under any government; this alone will be a sufficient cause why that government should degenerate into tyranny. If the denomination and the penalties of treason be communicated to offences of a different and inferiour kind; the horrour, which would otherwise attend this complicated crime, is weakened by the association with things, to which, in truth, it has neither relation nor resemblance.

In the reign of Henry the eighth, a law was made in England by which any one, who predicted the death of the king, was declared guilty of treason. Arbitrary power, on some occasions, recoils upon those who exert it. When this capricious and tyrannical prince lay on his death bed, his physicians would not inform him of his danger, because they would not incur the penalties of his law. We are told by the English parliament itself, that, at another period, so many "pains of treason were ordained by statute, that no man knew how to behave himself, to do, speak, or say, for doubt of such pains."

[b] Laws U. S. Con. 1. sess. 1. c. 20. s. 9.

Under our national government, we have not only a legal, but a constitutional security against arbitrary and constructive treasons.

1. Under that government, treason against the United States can be committed *only* by levying war against them, or by adhering to their enemies, giving them aid and comfort. [c]

2. Misprision of treason consists in knowing the commission of treason, and not disclosing it, as soon as may be, to the president or some one of the judges of the United States, or to the first executive magistrate or some one of the judges or justices of a particular state. [d]

Other crimes and offences against the United States may be comprised under the following enumeration.— 3. Wilful murder, committed in any place under the exclusive jurisdiction of the United States, [e] or upon the high seas, or in any river, haven, basin or bay not within the jurisdiction of any particular state. [f] 4. Manslaughter committed in any place under the exclusive jurisdiction of the United States, [g] or upon the high seas. [h] 5. Robbery committed upon the high seas, or in any river, haven or bay not within the jurisdiction of any particular state. [i] 6. The piratical and felonious running away with any vessel, or with any goods to the value of fifty dollars, or yielding up such vessel voluntarily to any pirate, by any captain or mariner of such vessel. [j] 7. The laying of vio-

[c] Con. U. S. art. 3. s. 3. [d] Laws U. S. Con. 1. sess. 2. c. 9. s. 2.

[e] Laws U. S. con. 1. sess. 2. c. 9. s. 3. [f] Id. s. 8. [g] Id. s. 7.

[h] Id. s. 12. [i] Id. s. 8. [j] Id. ibid.

lent hands, by a seaman, upon his commander, in order to hinder his fighting in defence of his ship or goods committed to his trust.[k] 8. The making of a revolt in a ship by any seaman.[l] 9. Piracy or robbery (as specified in the law) or any act of hostility against the United States or a citizen thereof, committed by any citizen upon the high seas, on pretence of authority from any person, or under colour of a commission from a foreign prince or state.[m] 10. Confederacy with pirates.[n] 11. The false making, altering, forging, or counterfeiting of any certificate, indent, or other publick security of the United States.[o] 12. The causing or procuring of any certificate, indent, or other publick security of the United States to be falsely made, altered, forged, or counterfeited.[p] 13. Acting or assisting willingly in the false making, altering, forging, or counterfeiting of any such certificate, indent, or other publick security.[q] 14. The uttering, putting off, or offering, in payment or for sale, of any such false, forged, altered, or counterfeited certificate, indent, or other publick security, with intention to defraud any person, and with knowledge that the same is false, altered, forged, or counterfeited.[r] 15. The causing of any such false, forged, altered, or counterfeited certificate, indent, or other publick security to be uttered, put off, or offered, in payment or for sale, with the knowledge and intention already mentioned.[s] 16. The setting at liberty by force, and the rescuing of any person, convicted of a capital crime, or, before conviction, committed for a capital crime, or committed for or convicted of any other offence.

[k] Laws U. S. con. 1. sess. 2. c. 9. s. 8. [l] Id. ibid. [m] Id. s. 9.
[n] Id. s. 12. [o] Id. s. 14. [p] Id. ibid. [q] Id. ibid. [r] Id. ibid.
[s] Id. ibid. [t] Id. s. 23.

17. Misprision of felony, which consists in knowing the commission of wilful murder or other felony upon the high seas, or within any fort, arsenal, dock yard, magazine, or other place or district of country under the sole and exclusive jurisdiction of the United States, and not disclosing it as soon as may be to some one of the judges or other person in civil or military authority under the United States.[u] 18. The cutting off of the ear, the cutting out or disabling of the tongue, the putting out of an eye, the slitting of the nose, the cutting off of the nose or a lip, the cutting off or disabling of any limb or member of any person, unlawfully, on purpose and of malice aforethought, and with intention, in so doing, to maim or disfigure such person: provided these crimes be committed in any place under the exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States or to any citizen of the United States.[v] 19. Perjury committed wilfully and corruptly on oath or affirmation in any suit or matter before any court, or in any deposition taken pursuant to a law, of the United States.[w] 20. The procuring of any person to commit corrupt and wilful perjury in any of the cases just mentioned.[x] 21. The giving, directly or indirectly, of any sum of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security for the payment or delivery of any money, present, or reward, or any other thing, to procure the opinion, judgment, or decree of any judge of the United States in any suit or matter depending before him.[y] 22. The accepting by any judge of any such sum of money, bribe, present,

[u] Laws U. S. con. 1. sess. 2. c. 9. s. 6. [v] Id. s. 13. [w] Id. s. 18.

[x] Id. ib. [y] Id. s. 21.

reward, promise, contract, obligation, or security.[z] 23. Oppression or extortion by any supervisor or officer of inspection, in the execution of his office.[a] 24. The landing, in any place within the limits of the United States, of goods entered for exportation, with a view to draw back the duties.[b] 25. The resisting or impeding of any officer of the customs, or any person assisting him, in the execution of his duty.[c] 26. The resisting or opposing, knowingly and wilfully, of any officer of the United States in serving or attempting to serve process of any court of the United States: and the assaulting, beating, or wounding of any officer, or other person duly authorized, in serving or attempting to serve such process.[d] 27. The felonious stealing, taking away, altering, falsifying, or otherwise avoiding of any record, writ, process, or other proceeding in any court of the United States, by means whereof any judgment shall not take effect, or shall be reversed or made void.[e] 28. The acknowledging or procuring to be acknowledged, in any court of the United States, of any recognizance, bail, or judgment, in the name of any person not privy or consenting to it. There is an exception with regard to attornies duly admitted.[f] 29. Taking and carrying away, with an intent to steal or purloin the personal goods of another, upon the high seas, or in any place within the exclusive jurisdiction of the United States.[g] 30. The embezzling, purloining, or conveying away of any victuals provided for any soldiers, gunners, marines, or pioneers, or of any arms, ordnance,

[z] Laws U. S. con. 1. sess. 2. c. 9. s. 21. [a] Id. sess. S. c. 15. s. 39.

[b] Id. sess. 2. c. 35. s. 59. [c] Id. sess. 2. c. 35. s. 50.

[d] Id. sess. 2. c. 9. s. 22. [e] Id. sess. 2. c. 9. s. 15. [f] Id. ibid.

[g] Id. sess. 2. c. 9. s. 16.

munition, shot, powder, or habiliments of war, belonging to the United States, by any person having the charge or custody thereof; provided such embezzling, purloining, or carrying away be for lucre, or willingly, advisedly and of purpose to impede the service of the United States.[h] 31. The suing forth, or prosecuting, or executing of any writ or process, by which the person of any publick foreign minister, received as such by the president of the United States, or any domestick or domestick servant of any such minister, may be arrested or imprisoned, or his goods seized.[i] 32. The violation of any safe conduct or passport duly obtained under the authority of the United States.[j] 33. The assaulting, striking, wounding, imprisoning, or, in any other manner, infracting the laws of nations by offering violence to the person of a publick minister.

In the foregoing catalogue, murder, manslaughter, robbery, piracy, forgery, perjury, bribery, and extortion are mentioned as crimes and offences; but they are neither defined nor described. For this reason, we must refer to some *preexisting* law for their definition or description. To what preexisting law should this reference be made?

This is a question of immense importance and extent. It must receive an answer; but I cannot, in this address, assign my reasons for the answer which I am to give—The reference should be made to the *common law*.

To the common law, then, let us resort for the definition or description of the crimes and offences, which,

[h] Laws U. S. con. 1. sess. 2. c. 9. s. 16. [i] Id. s. 25. 26.

[j] Id. s. 28. [k] Id. ibid.

in the laws of the United States, have been named, bu have not been described or defined. You will, in this manner, gentlemen, be furnished with a legal standard, by the judicious application of which you may ascertain, with precision, the true nature and qualities of such facts and transactions as shall become the objects of your consideration and research.

In our law books, murder is thus described: it is when a person, of sound memory and of the age of discretion, unlawfully killeth any reasonable creature with malice aforethought, express or implied. Manslaughter is described as—the unlawful killing of another, without malice, either express or implied. The distinction strongly marked between murder and manslaughter is, that the former is committed with, the latter, without malice aforethought. It is essential, therefore, to know clearly and accurately the true and legal import of this characteristick distinction.

There is a very considerable difference between that sense, which is conveyed by the expression, malice, in common language, and that, to which the term is appropriated by the law. In common language, it is most frequently used to denote a sentiment or passion of strong malevolence to a particular person; or a settled anger and desire of revenge in one person against another. In law, it means the dictate of a wicked and malignant heart; of a depraved, perverse, and incorrigible disposition. Agreeably to this last meaning, many of the cases, which are arranged under the head of implied malice, will be found to turn upon this single point; that the fact has been attended with such circumstances—particularly the circumstances of deliberation and cruelty concurring—as

betray the plain indications and genuine symptoms of a mind grievously depraved, and acting from motives highly criminal; of a heart regardless of social duty, and fatally bent upon mischief. This is the true notion of *malice* in the *legal* sense of the word. The mischievous and vindictive spirit denoted by it must always be collected and inferred from the circumstances of the transaction. On the circumstances of the transaction, the closest attention should, for this reason, be bestowed. Every circumstance may weigh something in the scale of justice.

Robbery is a felonious and violent taking, from the person of another, of money or goods to any value, putting him in fear. From this definition it appears, that to constitute a robbery, the three following ingredients are indispensable. 1. A felonious intention, or *animus furandi*. 2. Some degree of violence and putting in fear. 3. A taking from the *person* of another. Upon each of these three points there is much learned disquisition in the books of the law.

Piracy is robbery and depredation upon the high seas. The word *pirate*, says my Lord Coke,[1] in Latin *pirata*, is derived from the Greek word πειρατης, which is again fetched from πειραω *a transeundo mari*, or roving upon the sea; and, therefore, in English, a pirate is called a *rover* or *robber* upon the sea.

Piracy is a crime against the universal law of society: a pirate is *hostis humani generis*, an enemy of the whole human race. By declaring war against all mankind, he

[1] 3 Inst. 113.

has laid all mankind under the necessity of declaring war against him. He has renounced the benefits and protection of government and society: he has abandoned himself to a savage state of nature. The consequence is, that, by the laws of selfdefence, every community has a right to inflict upon him that punishment, which, in a state of nature, every individual would be entitled to inflict for any invasion of his person or personal property.

"If any *person*," says a law of the United States, "shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, *murder*, or *robbery*, or *any other* offence, which, if committed within the *body of a county*, would, by the laws of the United States, be punishable with death; every such offender shall be deemed, taken, and adjudged to be a *pirate and felon*, and being thereof convicted, shall suffer death." [m]

Placed in the high and responsible office of a judge of the United States, I feel myself under an official obligation to state some doubts, which arise in my mind upon this part of the law. Impressed, as I ought to be, both as a citizen and a judge, with the strongest regard for the legislative authority of the United States, I propose those doubts most respectfully, and with the greatest degree of diffidence.

Piracy, as we have seen, is a crime against the universal law of society. By that law, it may be punished by every community. But the description of piracy, according to *that* law, is a *robbery* and *depredation* on the

[m] Laws U. S. 1. con. 2. sess. c. 9. s. 8.

high seas. Is a *murder*, committed upon the high seas, a *piracy* within the description of that law? "If a pirate, at sea,[n] assault a ship, but, by force, is prevented entering her; and, in the *attempt*, the pirate *kill* a person in the other ship; they are all principals in such a *murder*, if the common law have jurisdiction of the offence; but by the law *maritime*, if the parties be known, they *only* who gave the wound shall be *principals*, and the rest, *accessories*." From this authority and the foregoing description of piracy, taken jointly into our consideration, we might, perhaps, be naturally led to infer, 1. That a murder perpetrated in the *attempt* to commit a piracy, is not a piracy. 2. That *this* crime perpetrated in *such* an attempt, is, by the *maritime law* to be tried and punished as a *murder*, in which those, who *all* attempted the *piracy*, shall be considered as criminal in *different* degrees, according to the part, which they *severally* acted with regard to the *homicide*.

The maritime law, is not the law of any particular country: it is the general law of nations. "Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit."[o]

The law of nations has its foundation in the principles of natural law, applied to states; and in voluntary institutions, arising from custom or convention. This law is universal in its authority over the civilized part of the world; and is supported by the consideration of its general utility, as well as that of its obligatory force. This universal system has always been most liberally

[n] Molloy. c. 4. s. 13. [o] 2. Burr. 887.

recognized in that country, from which we derive the boasted inheritance of the common law. According to the clear opinion declared by the great Lord Chancellor Talbot, the law of nations is, in *its full extent*, a part of the law of England. [p]

True it is, that, so far as the law of nations is *voluntary* or *positive*, it may be altered by the municipal legislature of any state, in cases affecting *only* its own citizens. True it is also, that, by a treaty, the voluntary or positive law of nations may be altered so far as the alteration shall affect *only* the contracting parties. But equally true it is, that no state or states can, by treaties or municipal laws, alter or abrogate the law of nations any farther. This they can no more do, than a citizen can, by his single determination, or two citizens can, by a private contract between them, alter or abrogate the laws of the community, in which they reside.

Now the doubts, to which I have alluded, appear directly before us. Is a *person*, *not* a citizen of the United States, who shall commit a murder upon the high seas, liable, *under this law*, to be deemed, taken and adjudged to be a *pirate* and felon, and, as *such*, to suffer death? This question may be divided into two subordinate ones. 1. Was it the intention of the legislature, that this law should extend, in its operation, to persons not citizens of the United States? In the very next section, the phrase is altered, and instead of saying, if any *person* shall commit, it is said, if any *citizen* shall commit any piracy, &c. Shall the construction be, that the legislature mean the same thing, when they

[p] 2. Burr. 1481.

use expressions so very different? 2. On the supposition, that the law was designed to extend, in its operation, to persons not citizens of the United States; can this design be carried into effect, consistently with the predominant authority of the law of nations, and of the universal law of society?

The case may very probably happen, and come before a grand jury for their official investigation. It was proper to suggest my doubts concerning it. I hope I have suggested them in the manner which I proposed to myself.

I return to the definitions and descriptions given, by the common law, of the crimes and offences mentioned, but not described or defined, in the laws of the United States.

To forge, says my Lord Coke, is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will. The offence is called *crimen falsi;* the crime of falsehood; and the offender, *falsarius*, a falsifier. And this is properly taken when the act is done in the name of another person.[1] With regard, however, to this last part of the description of forgery, it has been since adjudged repeatedly and very solemnly to be too narrow. It expresses, indeed, the most obvious meaning of the word, and comprehends that species of forgery which is most commonly practised; but there are other species, which will not come within the letter of that description. An alteration in the name or quantity of land conveyed, or in the sum of

[1] 3. Ins. 169.

money secured, is of this kind, and comes within the legal notion of forgery.

Wilful and corrupt perjury is a crime committed, when a lawful oath is administered, in some judicial proceeding, by one who has authority, to a person who swears absolutely and falsely, in a matter material to the issue or cause in question.

"An oath," says my Lord Coke, "is so sacred, and so deeply concerns the consciences of men, that it cannot be administered *to* any one, unless it be allowed by the common law, or by act of parliament; nor *by* any one, who has not authority by common law, or by act of parliament: neither can any oath, allowed by the common law, or by act of parliament, be altered, unless by act of parliament."[r] For these reasons, it is much to be doubted whether any magistrate is justifiable in administering voluntary affidavits unsupported by the authority of law. It is more than possible, that, by such idle oaths, a man may frequently incur the guilt, though he evade the temporal penalties of perjury.

It is a part of the foregoing definition of perjury, that it must be when the person swears *absolutely*. In addition to this, it has been said, that the oath must be *direct*, and not, as the deponent thinks, or remembers, or believes.[s] This doctrine has, however, been lately questioned, and, it seems, on solid principles. When a man swears, that he believes what, in truth, he does not believe, he pronounces a falsehood as much as when he swears absolutely, that a thing is true, which he knows

[r] 3. Ins. 165. [s] Id. 166. 1. Haw. 178.

not to be true. My Lord Chief Justice De Grey, in a late case, said, that it was a mistake, which mankind had fallen into, that a person could not be convicted of perjury for deposing on oath, according to his belief. [t] It is certainly true, says my Lord Mansfield, that a man may be indicted for perjury, in swearing that he believes a fact to be true, which he must know to be false. [u]

Bribery is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in office. He who offers or gives, as well as he who receives this undue reward, is guilty of an offence against the law.

Extortion, taken in a large sense, is any oppression by colour or pretence of right; but, in its proper sense, it is a great misprision, in wresting by any officer, under colour of his office, any money, either when none at all is due, or not so much is due, or when it is not yet due.

I have now enumerated, and, by references to the common law, have explained the crimes and offences known to the constitution and laws of the United States. It is next in order to consider the several punishments, which are annexed to those crimes and offences.

These punishments are of seven different kinds: disqualification for office—fine—imprisonment—whipping—pillory—incapacity to give testimony—death. To

[t] Leach. 304. [u] Ibid.

some crimes more kinds of punishment than one are assigned. To resistance of the officers of the customs is annexed a fine.[v] To the landing of goods entered for exportation imprisonment is the punishment allotted.[w] To bribery[x] and extortion[y] the punishments of disqualification, fine, and imprisonment are assigned. To misprision of treason,[z] manslaughter,[a] misprision of felony,[b] atrocious maiming,[c] a confederacy with pirates,[d] resistance against process,[e] a rescue of persons not convicted of any capital crime,[f] serving process for arresting a publick minister,[g] the violation of a safe conduct, and violence to the person of a publick minister,[h] are assigned the punishments of fine and imprisonment. Stealing or falsifying records, and fraudulently acknowledging bail, are punished with fine, imprisonment, and whipping.[i] Fine and whipping are the punishments annexed to larceny.[j] To perjury and subornation of perjury are allotted the punishments of fine, imprisonment, the pillory, and incapacity to give testimony.[k]

It deserves to be remarked, that, in every instance of punishment by fine, imprisonment, or whipping, limits are fixed on the side of severity; none, on the side of mercy.

[v] Laws U. S. con. 1. sess. 2. c. 35. s. 50. [w] Id. s. 59.

[x] Id. sess. 2. c. 9. s. 21. [y] Id. sess. 3. c. 15. s. 39.

[z] Id. sess. 2. c. 9. s. 2. [a] Id. s. 7. 12. [b] Id. s. 6.

[c] Id. s. 13. [d] Id. s. 12. [e] Id. s. 22. [f] Id. s. 23.

[g] Id. s. 26. [h] Id. s. 28. [i] Id. s. 15. [j] Id. s. 16.

[k] Id. s. 18.

Against forging,[l] against procuring or assisting to forge publick securities,[m] against uttering or causing to be uttered securities, which are forged,[n] against the rescue of persons convicted of capital crimes,[o] against piracy,[p] against robbery,[q] against acts of hostility as specified in the law,[r] against making a revolt in a ship, against violently hindering the captain of a vessel to fight in its defence, against piratically running away with any vessel,[s] against murder,[t] and against treason,[u] the punishment of death is denounced.

Accessories before[v] the fact to murder, robbery, or other piracy upon the seas shall suffer death. Accessories after[w] the fact shall be fined and imprisoned. Receivers of stolen goods[x] shall be liable to like punishments as in the case of larceny.

It is proper to point out to a grand jury the kinds and the grades of *punishments;* because the respect due to the legislature will lead us to conclude, that there are similar kinds and well adjusted grades of *crimes;* because the probability of a crime is in the inverse proportion to its atrociousness; and because, of consequence, a grand jury will require a degree of evidence adequate to the criminality of every charge, which comes under their consideration.

[l] Laws U. S. con. 1. sess. 2. c. 9. s. 14. [m] Id. ibid. [n] Id. ibid.
[o] Id. s. 23. [p] Id. s. 8. [q] Id. ibid. [r] Id. s. 9. [s] Id. s. 8.
[t] Id. s. 3. [u] Id. s. 1. [v] Id. s. 10. [w] Id. s. 11.
[x] Id. s. 17.

No person shall be prosecuted for any capital crime, wilful murder or forgery excepted, unless the indictment for it shall be found within three years after its commission: nor shall any person be prosecuted for an offence not capital, or for a crime or forfeiture under a penal law, unless the indictment or information for it shall be found or instituted within two years after the commission of the offence, or after the fine or forfeiture has incurred. But these provisions shall not operate in favour of such as flee from justice. [y]

One, who is indicted of treason, shall have, at least three days before his trial, a copy of the indictment, and a list, containing the names and places of abode, of the jurors and of the witnesses to be produced on the trial. A person indicted for any other capital crime shall have, at least two entire days before his trial, such a list of the jury, and a copy of the indictment. [z]

The trial of all crimes shall be by jury. [a]

Every one indicted shall be allowed to make his full defence by counsel learned in the law. The court, or a judge of the court, before whom he is to be tried, shall, on his request, assign him counsel, such as he shall desire, but not exceeding two; and his counsel shall have free access to him at all seasonable hours. He shall also be admitted to make, in his defence, any proof, which he can produce by witnesses: to compel the attendance of his witnesses at his trial he shall have legal process, simi-

[y] Laws U. S. con. 1. sess. 2. c. 9. s. 32. [z] Id. s. 29.

[a] Con. U. S. art. 3. s. 2.

lar to that, which is granted to compel witnesses to appear on the prosecution against him. [b]

No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. [c]

The benefit of clergy shall not be used or allowed, upon the conviction of any crime, for which, by any statute of the United States, the punishment is or shall be declared to be death. [d]

The manner of inflicting the punishment of death shall be by hanging the person convicted, by the neck, until dead. [e]

No conviction or judgment for any offence, yet punishable by the laws of the United States, shall work corruption of blood, or any forfeiture of estate. [f]

I have now, gentlemen, given you an account, plain and concise, and yet, I hope, not altogether imperfect, of the criminal code of the United States. It will be interesting and instructive to compare this code, in some of its most remarkable regulations, with that of some other country. For this comparison, I select the criminal code of England. I select it, because, in other parts of Europe, it has been proposed as a model, on account of its mildness; and because, contrasted with many systems of criminal law, it is, indeed, comparatively mild. "That the English system of jurisprudence has its abuses, I will

[b] Laws U. S. con. 1. sess. 2. c. 9. s. 29. [c] Con. U.S. art. 3. s. 3.

[d] Laws U. S. con. 1. sess. 2. c. 9. s. 31. [e] Id. s. 33. [f] Id. s. 24.

readily agree," says a writer of a nation long the rival of England; "but that it has fewer abuses than the system of any other civilized country, is what I am able to prove."[g]

It is the opinion of some writers, highly respected for their good sense, as well as for their humanity, that capital punishments are, in no case, necessary. It is an opinion, which I am certainly well warranted in offering—that nothing but the most absolute necessity can authorize them. Another opinion I am equally warranted in offering—that they should not be aggravated by any sufferings, except those which are inseparably attached to a violent death.[h] It was worthy only of a tyrant[i]—and of a tyrant it was truly characteristick—to give standing instructions to his executioners, that they should protract the expiring moments of the tortured criminal; and should manage the butchering business with such studied and slow barbarity, as that his powers of painful sensation should continue to the very last—*ut mori se sentiat.*

Hear from the mouth of a celebrated lawyer—celebrated, however, for his learning, more than for his humanity—the sentence pronounced against treason by the law of England: hear this sentence, full of horrours, represented as flowing from admirable clemency and moderation.

[g] War. The. L. Crim. 18.

[h] —See they suffer death,
But in their deaths remember they are men. *Cato.*

[i] Caligula.

At the trial of the conspirators in the gun powder plot, Sir Edward Coke concluded the part which he acted as attorney general, in the following very remarkable manner. "The conclusion shall be drawn from the admirable clemency and moderation of the king, in that, howsoever these traitors have exceeded all others their predecessors in mischief, yet neither will the king exceed the *usual* punishment of the law, nor invent any *new* torture or torment for them; but is graciously pleased to afford them as well an ordinary course of trial, as an *ordinary punishment*, much *inferiour to their offence*. And surely, worthy of observation is the punishment provided and appointed for high treason. For first, after a traitor hath had his just trial, and is convicted and attainted, he shall have his judgment to be *drawn* to the place of execution from his prison, as being not worthy any more to tread upon the face of the earth whereof he is made: also for that he hath been retrograde to nature, therefore he is to be drawn backward at a horse tail. And whereas God hath made the head of man his highest and most supreme part, as being his chief grace and ornament; he must be drawn with his head declining downward, and lying so near the ground as may be, being thought unfit to take the benefit of the common air. For which cause also he shall be strangled, being hanged up by the neck, between heaven and earth, as deemed unworthy of both, or either; as likewise that the eyes of men may behold, and their hearts contemn him. Then he is to be cut down alive: his bowels and inlayed parts taken out and burnt, who inwardly had conceived and harboured in his heart such horrible treason. After, to have his head cut off, which had imagined the mischief. And, lastly, his body to be quartered, and the quarters set up in some high and eminent place, to the

view and detestation of men, and to become a prey for the fowls of the air. And this is a reward due to traitors."[j]

I relieve your feelings by a custom which was observed among the Jews. They gave wine mingled with myrrh to a criminal at the time of his execution, in order to produce a stupor, and deaden the sensibility of the pain.

By the *constitution* of the United States, no attainder of *treason* shall work corruption of blood, or forfeiture, except during the life of the person attainted. By the *law* of the United States, as it now stands, no judgment for *any* offence shall work corruption of blood or forfeiture of *any* estate.

In England, the forfeiture of a criminal's personal estate accrues immediately upon his *conviction* of treason or felony. On his *attainder* for *treason*, he forfeits to the king all his lands of inheritance, and all his rights of entry to lands and tenements. On his attainder for *felony*, he forfeits his lands in fee simple to the crown for a year and a day; and the king may, within that time, commit what waste he pleases, by cutting timber, by ploughing meadows, by extirpating gardens, and by pulling down houses.

This uncivilized regulation, hostile to the genius of publick prosperity and improvement, is not, however, attended with any additional misfortune to the children of the prisoner. Their ruin is already completed by the

[j] 1. St. Tri. 243.

corruption of their parent's blood. This unnatural principle—I call it unnatural, because it dissolves, as far as human laws can dissolve, the closest and the dearest ties of nature—this unnatural principle effectually intercepts from them the descent of his lands of inheritance, which, after the king's temporary right of forfeiture is satisfied, escheat to the lord of the fee.

Corruption of blood extends both upwards and downwards. A person attainted cannot inherit lands from his ancestors: he cannot transmit them to any heir: he even obstructs all descents to his posterity, whenever they must, through him, deduce their right from a more remote ancestor.

It has been alleged, in favour of forfeiture, that, since its effects extend to the family of the criminal as well as to himself, it will have a powerful operation to restrain a person from attempts against the state, not only by the fear of personal punishment, but also by his strongest natural affections. On a farther and closer investigation, however, it may, perhaps, be found, that this policy, as certainly it is not of the most generous, so neither is it of the most enlarged kind; since forfeitures, far from preventing, may have a tendency to multiply and to perpetuate offences and crimes.

When the law says, that the children of him, who has been guilty of crimes, shall be bereaved of all their hopes and all their rights of succession; that they shall languish in perpetual indigence and distress; that their whole life shall be one dark scene of unintermitted and unabating punishment; and that death alone shall provide for them a refuge from their misery—when such is

the language, or such is the effect of the law; with what sentiments must it naturally inspire those, who are doomed to become its unfortunate, though unoffending objects? With sentiments of a deadly feud against the state, which has adopted, and which enforces it. To a law of this kind we may, with peculiar propriety, apply the maxim—une loi rigoreuse produit des crimes.

In the United States, a period is assigned, beyond which crimes and offences, two excepted, cannot be prosecuted. This regulation is well calculated to establish and to preserve the security of individuals, and the tranquillity of the state. "Si post intervallum accusare (accusator) velit," says Bracton, "non erit de jure audiendus, nisi docere poterit se fuisse justis rationibus impeditum." [k]

The advantages of a copy of the indictment, of counsel at the trial, and of process to compel the appearance of the prisoner's witnesses are enjoyed, in England, only in prosecutions for treason, but not in prosecutions for other crimes.

The greatness of those advantages may be easily estimated by contemplating the helpless, the forlorn and the anxious situation of a person, who is deprived of them in a trial for his life.

When the bill for regulating trials in cases of high treason was, in the reign of William the third, brought into parliament; that part of it, which allows counsel to the prisoner, was viewed, by the friends of freedom,

[k] Brac. 118 b.

as a matter of the last importance. The Lord Ashley, afterwards earl of Shaftesbury and author of the celebrated Characteristicks, was then a member of the house of commons. Actuated by that zeal for the principles of liberty, which accompanied him through life, he composed, as he was well qualified to compose, an excellent speech in support of that important provision. When he rose to deliver it, the great and respectable audience, before which he appeared, intimidated him to such a degree, that he lost his powers of recollection, and was incapable of pronouncing what he had previously prepared. The house, eager to hear him, waited with solicitude till he should recover from his embarrassment, and, after some time, called loudly upon him to proceed. He proceeded in this manner: "If I, sir,"—addressing himself to the speaker—"If I, sir, who rise only to give my opinion on the bill now depending, am so confounded, that I am unable to express the least of what I proposed to say; what must the condition of that man be, who, without any assistance, is pleading for his life?"[1] What must his condition be! Unacquainted with the nature and with the forms of the whole proceedings against him, unassisted by counsel, "baited by crown lawyers," distracted by uncertainty and suspense, he finds a desperate but an eligible refuge in the awful verdict of conviction, which determines his fate.

Let us turn our eyes to a more pleasing prospect. How few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England! Allowance, we own, should be made for the difference between the na-

[1] Gen. Dict. vol. 9. p. 179.

ture of the two governments; the objects of one being *general;* those of the other, *enumerated.* But after every allowance is made for this consideration, still we may justly say—how few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England! When Sir William Blackstone wrote, no fewer than one hundred and sixty actions, which men are daily liable to commit, crowded the dismal list of felonies without benefit of clergy; in other words, felonies declared to be worthy of immediate death. Actions, almost inumerable, are doomed, by the same system, to severe, though inferiour penalties.

The co-acervation of sanguinary laws is a political distemper of the most inveterate and the most dangerous kind. By such laws the people are corrupted; and when corruption arises from laws the evil may well be pronounced to be incurable; for it proceeds from the very source, from which the remedy should flow.

This comparison between the criminal laws of England and those of the United States might be carried much farther. The contrast would become still more and more striking; and, of course, the result would become still more and more satisfactory.

"How happy would mankind be," says the eloquent and benevolent Beccaria,[m] "if laws were now to be first formed!" The United States enjoy this singular happiness. Their laws are now first formed. They are formed by the legitimate representatives of free citizens

[m] Chap. 26.

and free states. Among those citizens and those states they now begin to be diffused. To those citizens and those states they are objects of the greatest and most extensive importance. I speak particularly concerning the *criminal laws*. It is on the excellence of the criminal laws, says the celebrated Montesquieu,[n] that the liberty of the citizens principally depends. The knowledge, continues he, which has been already acquired in some countries, and that which may be hereafter acquired in others, with regard to the surest rules which can be observed in criminal judgments, is more interesting to the human kind, than any thing else in the universe. It is only, adds he, on the practice of this knowledge that liberty can be founded.

With regard to an individual, every one knows how much his fortunes and his character, his infelicity or his happiness depend on his education. What education is to the individual, the laws are to the community. "Good laws," says my lord Bacon, whose sentences are discourses, "make a whole nation to be as a well ordered college."[o] With what earnestness should every nation —with what peculiar earnestness should that nation, which boasts of liberty as the principle of her constitution—with what peculiar earnestness should she endeavour, that her laws, especially her criminal laws, should be improved to a degree of perfection as high as human policy and human virtue can carry them!

We have already seen, that the noblest end and aim of criminal jurisprudence is to prevent crimes: and we have already seen that punishments, mild, speedy, and

[n] Sp. L. b. 12. c. 2. [o] 4. Ld. Bac. 9.

certain, are means calculated for preventing them. But these are not the only means. Crimes may be prevented by the genius as well as by the execution of the criminal laws. Let them be few: let them be clear: let them be be simple: let them be concise: let them be consummately accurate. Let the punishment be proportioned—let it be analogous—to the crime. Let the reformation as well as the punishment of offenders be kept constantly and steadily in view: and, while the dignity of the nation is vindicated, let reparation be made to those, who have received injury. Above all, let the wisdom, the purity, and the benignity of the civil code supersede, for they are well calculated to supersede, the severity of criminal legislation. Let the law diffuse peace and happiness; and innocence will walk in their train.

I offer no apology, gentlemen, for the nature or the length of this address. A sense of duty has drawn it from me. Every member of society should have it in his power to know when he is criminal and when he is innocent. His criminality and his innocence should be designated by the laws. The code of criminal laws, therefore, should, as far as possible, be in the hands of every citizen. In the situation, in which I have the honour to be placed, I deem it my duty to embrace every proper opportunity of disseminating the knowledge of them far and speedily. Can this be done with more propriety than in an address to a grand jury—to a grand jury summoned and returned for the body of an extensive district—a district so extensive and important as that of Virginia? These considerations induced me to lay before you an enumeration of the crimes and the punishments known to our constitution and laws. This I have endeavoured to do with the utmost conciseness.

But, if the laws deserve it, they should be the objects of *affection* as well as of *knowledge*. Thinking, as I think, concerning the high degree of regard, to which the criminal code of the United States has an undoubted claim, I am *obliged* to express the principles, on which I conceive that claim to be founded. This I have likewise endeavoured to do with the utmost conciseness.

I mean not, however, to recommend to you an implicit and an undistinguishing approbation of the laws of your country. Admire; but admire with reason on your side.

If, for instance, you think, that the laws respecting the publick securities are more severe than is absolutely necessary for supporting their value and their credit; it will be no crime to express your thoughts decently and properly to your representatives in congress.

Permit me to suggest another method, by which our valuable code of criminal laws may be still increased in its value. Inform and practically convince every one within your respective spheres of action and intercourse, that, as excellent laws improve the virtue of the citizens, so the virtue of the citizens has a reciprocal and benign energy in heightening the excellence of the law.

How happy are the people, by whom the laws are known and rationally beloved! The rational love of the laws generates the enlightened love of our country. The enlightened love of our country is propitious to every virtue, which can adorn and exalt the citizen and the man.

# CONSIDERATIONS

ON THE

# BANK OF NORTH AMERICA.

PUBLISHED IN THE YEAR 1785.

# CONSIDERATIONS, &c. [a]

AN attack is made on the credit and institution of the Bank of North America. Whether this attack is justified by the principles of law and sound policy, is a natural subject of inquiry. The inquiry is as necessary and interesting, as it is natural: for, though some people represent the bank as injurious and dangerous, while others consider it as salutary and beneficial to the community, all view it as an object of high importance; deserving and demanding the publick attention.

In the investigation of this subject, it will be requisite to discuss some great and leading questions concerning the constitution of the United States, and the relation which subsists between them and each particular state in

[a] The publication of these considerations was occasioned by a bill, introduced into the legislature of Pennsylvania, to repeal an act of assembly passed in the year 1782, by which a charter of incorporation had been granted to the Bank of North America. The bill was passed into a law, in September 1785. *Ed.*

the Union. Perhaps it is to be wished that this discussion had not been rendered necessary; and that those questions had rested some time longer among the *arcana imperii:* but they are now presented to the publick; and the publick [redacted] view them with firmness, with impartiality, and [redacted] the solicitude befitting such a momentous occasion.

A gentleman,[b] who had the best opportunities of observing, and who possesses the best talents for judging on the subject, informs his fellow citizens officially, that "it may be not only asserted, but demonstrated, that, "without the establishment of the national bank, the busi- "ness of the department of finance could not have been "performed" in the late war.

The millennium is not yet come. War, with all the horrours and miseries in his train, may revisit us. The finances may again be deranged: "publick credit may, "again, be at an end: no means may be afforded adequate "to the publick expenses." Is it wise or politick to deprive our country, in such a situation, of a resource, which happy experience has shown to be of such essential importance? Will the citizens of the United States be encouraged to embark their fortunes on a similar bottom in a future war, by seeing the vessel, which carried us so successfully through the last, thrown aside, like a useless hulk, upon the return of peace?

It will not be improper to recal to our remembrance the origin, the establishment, and the proceedings of the Bank of North America.

[b] Vide the preface to the statement of the accounts of the United States.

In May, 1781, the superintendant of finance laid before congress a plan of a bank. On the 26th of that month, congress passed the following resolution concerning it.

"Resolved, That congress do approve of the plan for establishing a national bank in these United States, submitted to their consideration by Mr. Robert Morris, the 17th May, 1781, and that they will promote and support the same by such ways and means, from time to time, as may appear necessary for the institution, and consistent with the publick good.

"That the subscribers to the said bank shall be incorporated, agreeably to the principles and terms of the plan, under the name of "The President, Directors, and Company of the Bank of North America," so soon as the subscription shall be filled, the directors and president chosen, and application made to congress for that purpose, by the president and directors elected.

"Resolved, That it be recommended to the several States, by proper laws for that purpose, to provide that no other bank or bankers shall be established or permitted within the said states respectively during the war.

"Resolved, That the notes hereafter to be issued by the said bank, payable on demand, shall be receivable in payment of all taxes, duties, and debts, due or that may become due or payable to the United States.

"Resolved, that congress will recommend to the several legislatures to pass laws, making it felony without benefit of clergy, for any person to counterfeit bank

notes, or to pass such notes, knowing them to be counterfeit; also making it felony without benefit of clergy, for any president, inspector, director, officer, or servant of the bank, to convert any of the property, money, or credit of the said bank to his own use, or in any other way to be guilty of fraud or embezzlement, as officers or servants of the bank."

Under these resolutions a subscription was opened for the national bank: this subscription was not confined to Pennsylvania: the citizens of other States trusted their property to the publick faith; and before the end of December, 1781, the subscription was filled, "from an expectation of a charter of incorporation from congress." Application was made to congress by the president and directors, then chosen, for an act of incorporation. "The exigencies of the United States rendered it indispensably necessary that such an act should be immediately passed."[c] Congress, at the same time that they passed the act of incorporation, recommended to the legislature of each state, to pass such laws as they might judge necessary for giving its ordinance its full operation, agreeably to the true intent and meaning thereof, and according to the recommendations contained in the resolution of the 26th day of May preceding.

The bank immediately commenced its operations. Its seeds were small, but they were vigorous. The sums paid in by individuals upon their subscriptions did not amount in the whole, to seventy thousand dollars. The sum invested by the United States, in bank stock, amounted to something more than two hundred and fifty thou-

[c] See the act in the appendix.

sand dollars: but this sum may be said to have been paid in with one hand and borrowed with the other; and before the end of the first three months, farther sums were advanced to the United States, and an advance was made to this state.[d] Besides, numerous accommodations were afforded to individuals. Little was it then imagined that the bank would ever be represented as unfriendly to circulation. It was viewed as the source and as the support of credit, both private and publick: as such, it was hated and dreaded by the enemies of the United States: as such, it was loved and fostered by their friends.

Pennsylvania, distinguished on numerous occasions by her faithful and affectionate attachment to federal principles, embraced, in the first session of her legislature after the establishment of the bank, the opportunity of testifying her approbation of an act, which had been found to be indispensably necessary. Harmonizing with the sentiments and recommendations of the United States, the assembly passed an act,[e] "for preventing and punishing the counterfeiting of the common seal, bank bills, and bank notes, of the president, directors, and company of the Bank of North America." In the preamble to this act, which, according to the constitution of this state, expresses the reasons and motives for passing it, the "necessity" of taking "effectual measures for preventing and punishing frauds and cheats which may be put upon the president, directors, and company of the Bank of North America," is explicitly declared by the legislature.

[d] See in the appendix the different sums advanced to this state.

[e] 18th of March, 1782.

The sentiments and conduct of other states, respecting the establishment of the national bank by congress, were similar to those of Pennsylvania. The general assembly of Rhode Island and Providence Plantations [f] made it felony, without benefit of clergy, "to counterfeit any note or notes issued, or to be issued, from the Bank of North America, as approved and *established* by the United States in Congress assembled." The state of Connecticut enacted, [g] that a tax should be laid, payable in money, or "notes issued by the directors of the national bank, *established* by an ordinance of the United States in congress assembled." By a law of Massachussetts, the subscribers to the national bank, approved of by the United States, were "incorporated, on the behalf of that commonwealth, by the name of the president, directors and company of the Bank of North America, according to the terms of the ordinance to incorporate the said subscribers, passed by the United States in congress assembled on the thirty first day of December, 1781." The same law further enacts, "that all notes or bills, which have been or shall be issued by, for, or in the name of the said president, directors, and company, and payable on demand, shall be receivable in the payment of all taxes, debts and duties, due or that may become due, or payable to, or for account of, the said United States." In the preamble of this law, the legislature declares that "a national bank is of great service, as well to the publick as to individuals."

The president and directors of the bank had a delicate and a difficult part to act. On one hand, they were obliged to guard against the malice and exertions of their

[f] January Sessions, 1782. [g] 10th January, 1782.

enemies: on the other, it was incumbent on them to sooth the timidity of some of their friends. The credit of a bank, as well as all other credit, depends on opinion. Opinion, whether well or ill founded, produces, in each case, the same effects upon conduct. Some thought that an act of incorporation from the legislature of this state would be beneficial; none apprehended that it could ever be hurtful to the national bank. Prudence, therefore, and a disposition, very natural in that season of doubt and diffidence, to gratify the sentiments, and even the prejudices, of such as might become subscribers or customers to the bank, directed an application to the assembly for "a charter, similar to that granted by the United States in congress assembled." But though the directors were willing to avail themselves of encouragement from every quarter, they meant not to relinquish any of their rights, or to change the foundation on which they rested. They made their application in their *corporate* character.[h] They expressly mentioned to the assembly, that the United States in congress assembled had granted to the bank a charter of incorporation, and that the institution was to be carried on under their immediate auspices. The legislature thought that it was proper and reasonable to grant[i] the request of the *president and directors of the Bank of North America;* and assigned, as a reason for the act, "that the United States in congress assembled, from a conviction of the support which the finances of the United States would receive from the establishment of a *national bank*, passed an ordinance to incorporate the subscribers for this purpose,

[h] Their letter to the president of the supreme executive council, on this occasion, is in the appendix.

[i] 1st. of April, 1782.

by the name and style of the president, directors, and company of the Bank of North America."

The first clause of the law enacts, that "those who are, and those who shall become subscribers to the said bank, be, and forever hereafter shall be, a corporation and body politick, to all intents and purposes."

It is further enacted, that "the said corporation be, and shall be forever hereafter, able and capable in law to do and execute all and singular matters and things, that to them shall or may appertain to do."

To show, in the most striking light, the kind sentiments of the legislature towards the institution, it is further enacted, that "this act shall be construed and taken most favourably and beneficially for the said corporation."

On these facts and proceedings, two questions of much national importance present themselves to our view and examination.

I. Is the Bank of North America legally and constitutionally instituted and organized, by the charter of incorporation granted by the United States in congress assembled?

II. Would it be wise or politick in the legislature of Pennsylvania, to revoke the charter which it has granted to the institution?

The discussion of these two questions will naturally lead us to the proper conclusions concerning the validity and the utility of the bank.

I. Had the United States in congress assembled a legal and constitutional power to institute and organize the Bank of North America, by a charter of incorporation?

The objection, under this head, will be—that the articles of confederation express all the powers of congress, that in those articles no power is delegated to that body to grant charters of incorporation, and that, therefore, congress possess no such power.

It is true, that, by the second article of the confederation, "each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not, by the confederation, *expressly* delegated to the United States in congress assembled."

If, then, any or each of the states possessed, previous to the confederation, a power, jurisdiction, or right, to institute and organize, by a charter of incorporation, a bank for North America; in other words—commensurate to the United States; such power, jurisdiction, and right, unless expressly delegated to congress, cannot be legally or constitutionally exercised by that body.

But, we presume, it will not be contended, that any or each of the states could exercise any power or act of sovereignty extending over all the other states, or any of them; or, in other words, incorporate a bank, commensurate to the United States.

The consequence is, that this is not an act of sovereignty, or a power, jurisdiction, or right, which, by the second article of the confederation, must be expressly

delegated to congress, in order to be possessed by that body.

If, however, any person shall contend that any or each of the states can exercise such an extensive power or act of sovereignty as that above mentioned; to such person we give this answer—The state of Massachussetts has exercised such power and act: it has incorporated the Bank of North America. But to pursue my argument.

Though the United States in congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole: and, therefore, it is provided, in the fifth article of the confederation, "that for the more convenient manage-
"ment of the *general interests* of the United States,
"delegates shall be annually appointed to meet in con-
"gress."

To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it

must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defence, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

The act of independence was made before the articles of confederation. This act declares, that "*these United Colonies*," (not enumerating them separately) "are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states may, of right, do."

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation; it continues vested in them still. The confederation clothed the United States with many, though, perhaps, not with sufficient powers: but of none did it disrobe them.

It is no new position, that rights may be vested in a political body, which did not previously reside in any or in all the members of that body. They may be derived solely from the union of those members. [j] "The case," says the celebrated Burlamaqui, "is here very near the

[j] 2. Burl. 42.

"same as in that of several voices collected together, "which, by their union, produce a harmony, that was "not to be found separately in each."

A number of unconnected inhabitants are settled on each side of a navigable river; it belongs to none of them; it belongs not to them all, for they have nothing in common: let them unite; the river is the property of the united body.

The arguments drawn from the political associations of individuals into a state will apply, with equal force and propriety, to a number of states united by a confederacy.

New states must be formed and established: their extent and boundaries must be regulated and ascertained. How can this be done, unless by the United States in congress assembled?

States are corporations or bodies politick of the most important and dignified kind.

Let us now concentre the foregoing observations, and apply them to the incorporation of the Bank of North America by congress.

By the civil law, corporations seem to have been created by the mere and voluntary association of their members, provided such convention was not contrary to law.[k]

[k] 1. Bl. Com. 472.

By the common law, something more is necessary—All the methods whereby corporations exist are, for the most part, reducible to that of the king's letters patent, or charter of incorporation.[1]

From this it will appear that the creation of a corporation is, by the common law, considered as the act of the executive rather than of the legislative powers of government.

Before the revolution, charters of incorporation were granted by the proprietaries of Pennsylvania, under a derivative authority from the crown, and those charters have been recognised by the constitution and laws of the commonwealth since the revolution.

From analogy, therefore, we may justly infer, that the United States in congress assembled, possessing the executive powers of the union, may, in virtue of such powers, grant charters of incorporation for accomplishing objects that comprehend the general interests of the United States.

But the United States in congress assembled possess, in many instances, and to many purposes, the legislative as well as the executive powers of the union; and therefore, whether we consider the incorporation of the bank as a law, or as a charter, it will be equally within the powers of congress: for the object of this institution could not be reached without the exertion of the combined sovereignty of the union.

[1] 1. Bl. Com. 472. 473.

I have asked—how can new states, which are bodies politick, be formed, unless by the United States in congress assembled? Fact, as well as argument, justifies my sentiments on this subject. The conduct of congress has been similar on similar occasions. The same principles have directed the exercise of the same powers.

In the month of April, 1784, congress resolved, that part of the western territory "should be divided into distinct states."

They further resolved, that the settlers should, "either on their own petition, or on the order of congress, receive authority from *them* to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states."

"When any such state shall have acquired twenty thousand free inhabitants, on giving due proof thereof to congress, they shall receive from *them* authority to call a convention of representatives, to establish a permanent constitution and government for themselves."

"The preceding articles," among others, "shall be formed into a charter of compact; shall be duly executed by the president of the United States in congress assembled, under his hand and the seal of the United States; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable from and after the sale of any part of the territory of such state, but by the joint consent of the United States in congress assembled, and of the parti-

cular state within which such alteration is proposed to be made."

It will be difficult, I believe, to urge against the power of congress to grant a charter to the Bank of North America, any argument, which may not, with equal strength and fitness, be urged against the power of that body to form, execute, and promulgate a charter of compact for the new states.

The sentiments of the representatives of the United States, as to their power of incorporating the bank, ought to have much weight with us. Their sentiments are strongly marked by their conduct, in their first resolutions respecting the bank. These resolutions are made at the same time, and on the same subject: but there is a striking difference in their manner. It was thought proper "that no other bank should be permitted within any of the states, during the war." Congress "*recommended* to the several states to make provision, for that purpose, by proper laws." It was thought prudent that the bank should be protected, by penal laws, from fraud, embezzlement, and forgery. Congress *recommended* it to the several legislatures to pass such laws. It was deemed expedient that bank notes should be received in payment of sums payable to the United States: congress *resolve*, that the notes "shall be receivable" in such payments. It was judged necessary that the bank should have a charter of incorporation: congress *resolve*, that the bank "shall be incorporated," on application made "*to congress*" for that purpose. The line of distinction between those things in which congress could only recommend, and those in which they could act, is drawn in the clearest manner. The incorporation of the national

bank is ranked among those things, in which they could act.

This act of congress has, either expressly, or by implication, received the approbation of every state in the union. It was officially announced to every state by the superintendant of finance.[m] Had any one state considered it as an exercise of usurped power, would not that state have remonstrated against it? But there is no such remonstrance.

This act of congress has been most explicitly recognised by the legislature of Pennsylvania. The law for preventing and punishing frauds and cheats upon the bank was passed on the 18th of March, 1782, and before the bank had obtained a charter from this state. By that law it is made felony without benefit of clergy, to forge the common seal of the president, directors, and company of the Bank of North America. Who were the president, directors, and company of the Bank of North America? Those whom congress had made "a corporation and body politick, to all intents and purposes, by that name and style." How came that body by a "common seal?" The act of congress ordained that that body "should have full power and authority to make, have and use a common seal." In the act to incorporate the subscribers to the Bank of North America, the legislature, after reciting that the United States in congress assembled had "passed an ordinance to incorporate them," say, "the president and directors of the said bank have applied to this house for a similar act of incorporation, which request it is proper and reasonable to grant."

[m] See his letter in the appendix.

When the foregoing facts and arguments are considered, compared, and weighed, they will, it is hoped, evince and establish, *satisfactorily* to all, and *conclusively* on the legislature of Pennsylvania, the truth of this position——That the Bank of North America was legally and constitutionally instituted and organized, by the charter of incorporation granted by the United States in congress assembled.

II. Would it, then, be wise or politick in the legislature of Pennsylvania, to revoke the charter which it has granted to this institution? It would not be wise or politick——

1st. Because the proceeding would be nugatory. The recal of the charter of Pennsylvania would not repeal that of the United States, by which we have proved the bank to be legally and constitutionally instituted and organized.

2d. Because, though the legislature may destroy the legislative *operation*, yet it cannot undo the legislative *acknowledgment* of its own act. Though a statute be repealed, yet it shows the sense and opinion of the legislature concerning the subject of it, in the same manner as if it continued in force.[n] The legislature declared, in the law, that it was proper and reasonable to grant the request of the president and directors of the bank, for an act of incorporation similar to the ordinance of congress: no repeal of the law can weaken the force of that declaration.

3d. Because such a proceeding would wound that confidence in the engagements of government, which it

[n] Foster, 394.

is so much the interest and duty of every state to encourage and reward. The act in question formed a charter of compact between the legislature of this state, and the president, directors, and company of the Bank of North America. The latter asked for nothing but what was proper and reasonable: the former granted nothing but what was proper and reasonable: the terms of the compact were, therefore, fair and honest: while these terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other.

It may be asked—Has not the state power over her own laws?—May she not alter, amend, extend, restrain, and repeal them at her pleasure?

I am far from opposing the legislative authority of the state: but it must be observed, that, according to the practice of the legislature, publick acts of very different kinds are drawn and promulgated under the same form. A law to vest or confirm an estate in an individual—a law to incorporate a congregation or other society—a law respecting the rights and properties of all the citizens of the state—are all passed in the same manner; are all clothed in the same dress of legislative formality; and are all equally acts of the representatives of the freemen of the commonwealth. But surely it will not be pretended, that, after laws of those different kinds are passed, the legislature possesses over each the same discretionary power of repeal. In a law respecting the rights and properties of all the citizens of the state, this power may be safely exercised by the legislature. Why? Because, in this case, the interest of those who make the law (the members of assembly and their constituents) and the

interest of those who are to be affected by the law (the members of assembly and their constituents) is the same. It is a common cause, and may, therefore, be safely trusted to the representatives of the community. None can hurt another, without, at the same time, hurting himself. Very different is the case with regard to a law, by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, and of honour must, therefore, be established between them: for, if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community. Still more different is the case with regard to a law, by which an estate is vested or confirmed in an individual: if, in this case, the legislature may, at discretion, and without any reason assigned, devest or destroy his estate, then a person seized of an estate in fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.

For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact, and to be interpreted according to the rules and maxims, by which compacts are governed. A foreigner is naturalized by law: is he a citizen only during pleasure? He is no more, if, without any cause of forfeiture assigned and established, the law, by which he is naturalized, may at pleasure be repealed. To receive the legislative stamp of stability and permanency, acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture; where is the stamp of their stability? Their motto should be, "Levity."

If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction.

4th. It would not be wise or politick to repeal the charter granted by this state to the Bank of North America, because such a measure would operate, as far as it would have any operation, against the credit of the United States, on which the interest of this commonwealth and her citizens so essentially depends. This institution originated under the auspices of the United States: the subscription to the national bank was opened under the recommendations and the engagements of congress: citizens of this state, and of the other states, and foreigners have become stockholders, on the publick faith: the United States have pledged themselves "to promote and "support the institution by such ways and means, from "time to time, as may appear necessary for it, and consistent with the publick good."* They have recommended to the legislature of each state, "to pass such "laws as they might judge necessary for giving the ordinance incorporating the bank its full operation." Pennsylvania has entered fully into the views, the recommendations, and the measures of congress respecting the bank.

* 26th May, 1781.

She has declared in the strongest manner her sense of their propriety, their reasonableness, and their necessity: she has passed laws for giving them their full operation. Will it redound to the credit of the United States to adopt and pursue a contrary system of conduct? The acts and recommendations of congress subsist still in all their original force: will it not have a tendency to shake all confidence in the councils and proceedings of the United States, if those acts and recommendations are now disregarded, without any reason shown for disregarding them? What influence will such a proceeding have upon the opinions and sentiments of the citizens of the United States and of foreigners? In one year they see measures respecting an object of confessed publick importance adopted and recommended with ardour by congress; and the views and wishes of that body zealously pursued by Pennsylvania: in another year they see those very measures, without any apparent reason for the change, warmly reprobated by that state: they must conclude one of two things:—that congress adopted and recommended those measures hastily and without consideration; or that Pennsylvania has reprobated them undutifully and disrespectfully. The former conclusion will give rise to very unfavourable reflections concerning the discernment both of the state and of the United States: the latter will suggest very inauspicious sentiments concerning the federal disposition and character of this commonwealth. The result of the conclusion will be—that the United States do not deserve, or that they will not receive, support in their system of finance.—These deductions and inferences will have particular weight, as they will be grounded on the conduct of Pennsylvania, hitherto one of the most federal, active, and affectionate states in the Union.

5th. It would not be wise or politick in the legislature to repeal their charter to the bank; because the tendency of such a step would be to deprive this state and the United States of all the advantages, publick and private, which would flow from the institution, in times of war, and in times of peace.

Let us turn our attention to some of the most material advantages resulting from a bank.

1st. It increases circulation, and invigorates industry. "It is not," says Dr. Smith, in his Treatise on the Wealth of Nations, [p] "by augmenting the capital of the country, but by rendering a greater part of that capital active and productive than would otherwise be so, that the most judicious operations of banking can increase the industry of the country. The part of his capital which a dealer is obliged to keep by him unemployed, and in ready money, for answering occasional demands, is so much dead stock, which, so long as it remains in this situation, produces nothing either to him or to his country. The judicious operations of banking enable him to convert this dead stock into active and productive stock: into materials to work upon, into tools to work with, and into provisions and subsistence to work for; into stock which produces something both to himself and to his country. The gold and silver money which circulates in any country, and by means of which the produce of its land and labour is annually circulated and distributed to the proper consumers, is, in the same manner as the ready money of the dealer, all dead stock. It is a very valuable part of the capital of the country,

[p] Vol. 1. p. 483, 484.

which produces nothing to the country. The judicious operations of banking, by substituting paper in the room of a great part of this gold and silver, enables the country to convert a great part of this dead stock into active and productive stock; into stock which produces something to the country. The gold and silver money which circulates in any country may very properly be compared to a highway, which, while it circulates and carries to market all the grass and corn of the country, produces, itself, not a single pile of either. The judicious operations of banking, by providing, if I may be allowed so violent a metaphor, a sort of wagon-way through the air, enable the country to convert, as it were, a great part of its highways into good pasture and corn fields, and thereby to increase very considerably the annual produce of its land and labour."

The same sensible writer informs us, in another place, that "the [q] substitution of paper in the room of gold and silver money, replaces a very expensive instrument of commerce with one much less costly, and sometimes equally convenient. Circulation comes to be carried on by a new wheel, which it costs less both to erect and to maintain than the old one.—There are several sorts of paper money; but the circulating notes of banks and bankers is the species which is best known, and which seems best adapted for this purpose."—"These notes come to have the same currency as gold and silver money, from the confidence that such money can at any time be had for them."

Sir James Stewart calls banking "the great engine, [r] by which domestick circulation is carried on."

[q] Vol. 1. p. 434, 435.

[r] 2. Pol. Ec. 350.

To have a free, easy, and equable instrument of circulation is of much importance in all countries: it is of peculiar importance in young and flourishing countries, in which the demands for credit, and the rewards of industry, are greater than in any other. When we view the extent and situation of the United States, we shall be satisfied that their inhabitants may, for a long time to come, employ profitably, in the improvement of their lands, a greater stock than they will be able easily to procure. In such a situation, it will always be of great service to them to save as much as possible the expense of so costly an instrument of commerce as gold and silver, to substitute in its place one cheaper, and, for many purposes, not less convenient; and to convert the value of the gold and silver into the labour and the materials necessary for improving and extending their settlements and plantations.

"To the banks of Scotland," says Sir James Stewart,[1] "the improvement of that country is entirely owing; and until they are generally established in other countries of Europe, where trade and industry are little known, it will be very difficult to set those great engines to work."

2d. The influence of a bank on credit is no less salutary than its influence on circulation. This position is, indeed, little more than a corollary from the former. Credit is confidence; and, before we can place confidence in a payment, we must be convinced that he who is to make it will be both able and willing to do so at the time stipulated. However unexceptionable his character and fortune may be, this conviction can never

[1] 2. Pol. Ec. 356.

take place, unless in a country where solid property can be, at any time, turned into a circulating medium.

3d. Trade, as well as circulation and credit, derives great support and assistance from a bank. Credit and circulation produce punctuality; and punctuality is the soul of commerce. Let us appeal to experience as well as reason.

Dr. Smith says,[t] he has heard it asserted, that the trade of the city of Glasgow doubled in about fifteen years after the first erection of the banks there; and that the trade of Scotland has more than quadrupled since the first erection of the two publick banks at Edinburgh, of which one was established in 1695, and the other in 1727. Whether the increase has been in so great a proportion, the author pretends not to know. But that the trade of Scotland has increased very considerably during this period, and that the banks have contributed a good deal to this increase, cannot, he says, be doubted.

These observations, and observations similar to these, have induced Sir James Stewart to conclude,—that "Banking,[u] in the age we live, is that branch of credit which best deserves the attention of a statesman. Upon the right establishment of banks depends the prosperity of trade, and the equable course of circulation. By them solid property may be melted down. By the means of banks, money may be constantly kept at a due proportion to alienation. If alienation increases, more property may be melted down. If it diminishes, the quantity of money stagnating will be absorbed by the

[t] Vol. 1. p. 442. [u] 2. Pol. Ec. 358.

bank, and part of the property formerly melted down in the securities granted to them will be, as it were, consolidated anew. These must pay, for the country, the balance of their trade with foreign nations: these keep the mints at work: and it is by these means, principally, that private, mercantile, and publick credit is supported."

I make no apology for the number and length of the quotations here used. They are from writers of great information, profound judgment, and unquestioned candour. They appear strictly and strongly applicable to my subject: and being so, should carry with them the greatest weight and influence; for the sentiments, which they contain and inculcate, must be considered as resulting from general principles and facts, and not as calculated for any partial purpose in this commonwealth.

But, here, it will probably be asked—Has your reasoning been verified by experience in this country? What advantages have resulted from the bank to commerce, circulation, and credit? Was our trade ever on such an undesirable footing? Is not the country distressed by the want of a circulating medium? Is not credit almost totally destroyed?

I answer—There is, unfortunately, too much truth in the representation: but if events are properly distinguished, and traced to their causes, it will be found—that none of the inconveniences abovementioned have arisen from the bank—that some of them have proceeded, at least in part, from the opposition which has been given to it—and that, as to others, its energy has not been sufficient to counteract or control them.

The disagreeable state of our commerce has been the effect of extravagant and injudicious importation. During the war, our ports were in a great measure blocked up. Imported articles were scarce and dear; and we felt the disadvantages of a stagnation in business. Extremes frequently introduce one another. When hostilities ceased, the floodgates of commerce were opened; and an inundation of foreign manufactures overflowed the United States: we seemed to have forgot, that to pay was as necessary in trade as to purchase; and we observed no proportion between our imports, and our produce and other natural means of remittance. What was the consequence? Those who made any payments made them chiefly in specie; and in that way diminished our circulation. Others made no remittances at all, and thereby injured our credit. This account of what happened between the European merchants and our importers, corresponds exactly with what happened between our importers and the retailers spread over the different parts of the United States. The retailers, if they paid at all, paid in specie: and thus every operation, foreign and domestick, had an injurious effect on our credit, our circulation, and our commerce, But are any of these disadvantages to be ascribed to the bank? No. Is it to be accounted a fault or defect in the bank, that it did not prevent or remedy those disadvantages? By no means. Because one is not able to stem a torrent, is he therefore to be charged with augmenting its strength? The bank has had many difficulties to encounter. The experiment was a new one in this country: it was therefore necessary that it should be conducted with caution. While the war continued, the demands of the publick were great, and the stock of the bank was but inconsiderable; it had its active enemies, and its timid friends.

Soon after the peace was concluded, its operations were restrained and embarrassed by an attempt to establish a new bank. A year had not elapsed after this, when the measure, which has occasioned these considerations, was introduced into the legislature, and caused, for some time, a total stagnation in the business of the institution. When all these circumstances are recollected and attended to, it will be matter of surprise that the bank has done so much, and not that it has done no more. Let it be deemed, as it ought to be, the object of publick confidence, and not of publick jealousy: let it be encouraged, instead of being opposed, by the counsels and proceedings of the state: then will the genuine effects of the institution appear; then will they spread their auspicious influence over agriculture, manufactures, and commerce.

4th. Another advantage to be expected from the Bank of North America is, the establishment of an undepreciating paper currency through the United States. This is an object of great consequence, whether it be considered in a political, or in a commercial view. It will be found to have a happy effect on the collection, the distribution, and the management of the publick revenue: it will remove the inconveniences and fluctuation attending exchange and remittances between the different states. "It is the interest of every trading state to have a sufficient quantity of paper, well secured, to circulate through it, so as to facilitate payments every where, and to cut off inland exchanges, which are a great clog upon trade, and are attended with the risk of receiving the paper of people, whose credit is but doubtful."[x]

[x] 2. Pol. Ec. 415.

Such are the advantages which may be expected to flow from a national bank, in times of peace. In times of war, the institution may be considered as essential. We have seen that, without it, the business of the department of finance could not have been carried on in the late war. It will be of use to recollect the situation of the United States with regard to this subject. The two or three first years of the war were sufficient to convince the British government, and the British armies, that they could not subdue the United States by military force. Their hopes of success rested on the failure of our finances. This was the source of our fears, as well as of the hopes of our enemies. By this thread our fate was suspended. We watched it with anxiety: we saw it stretched and weakened every hour: the deathful instrument was ready to fall upon our heads: on our heads it must have fallen, had not publick credit, in the moment when it was about to break asunder, been entwined and supported by the credit of the bank. Congress, to speak without metaphors, had not money or credit to hire an express, or purchase a cord of wood. General Washington, on one occasion, and probably more than one, saw his army literally unable to march. Our distress was such, that it would have been destruction to have divulged it: but it ought to be known now; and when known, ought to have its proper influence on the publick mind and the publick conduct.

The expenses of a war must be defrayed, either—— 1st, by treasures previously accumulated——or 2dly, by supplies levied and collected within the year, as they are called for——or 3dly, by the anticipation of the pub-

lick revenues. No one will venture to refer us to the first mode. To the second the United States, as well as every state in Europe, are rendered incompetent by the modern system of war, which, in the military operations of one year, concentres the revenue of many. While our enemies adhere to this system, we must adopt it. The anticipation of revenue, then, is the only mode, by which the expenses of a future war can be defrayed. How the revenues of the United States can be anticipated without the operations of a national bank, I leave to those who attack the Bank of North America to show. They ought to be well prepared to show it; for they must know, that to be incapable of supporting a war is but a single step from being involved in one.

The result of the whole, under this head, is,—that in times of peace, the national bank will be highly advantageous; that in times of war, it will be essentially necessary, to the United States.

I flatter myself, that I have evinced the validity and the utility of the institution.

It has been surmised, that the design of the legislature is not to destroy, but to modify, the charter of the bank; and that if the directors would assent to reasonable amendments, the charter, modified, might continue in force. If this is the case, surely to repeal the law incorporating the bank is not the proper mode of doing the business. The bank was established and organized under the authority and auspices of congress. The directors have a trust and duty to discharge to the United States, and to all the particular states, each of

which has an equal interest in the bank. They could not have received, from this state, a charter, unless it had been *similar* to that granted by congress. Without the approbation of congress, where all the states are represented, the directors would not be justified in agreeing to any alteration of the institution. If alterations are necessary; they should be made through the channel of the United States in congress assembled.

# APPENDIX

TO THE

# PRECEDING CONSIDERATIONS.

## AN ORDINANCE, TO INCORPORATE THE SUBSCRIBERS TO THE BANK OF NORTH AMERICA.

WHEREAS congress, on the twenty sixth day of May last, did, from a conviction of the support which the finances of the United States would receive from the establishment of a national bank, approve a plan for such an institution, submitted to their consideration by Robert Morris, Esq. and now lodged among the archives of congress, and did engage to promote the same by the most effectual means: and whereas the subscription thereto is now filled, from an expectation of a charter of incorporation from congress, the directors and president are chosen, and application hath been made to congress, by the said president and directors, for an act of incorporation: and whereas the exigencies of the United States render it indispensably necessary that such an act be immediately passed:

Be it therefore ordained, and it is hereby ordained by the United States in congress assembled, That those who are, and those who shall become subscribers to the said bank, be, and

for ever after shall be, a corporation and body politick, to all intents and purposes, by the name and style of The President, Directors and Company of the Bank of North America.

And be it further ordained, That the said corporation are hereby declared and made able, and capable in law to have, purchase, receive, possess, enjoy and retain lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind, nature or quality soever, to the amount of ten millions of Spanish silver milled dollars, and no more, and also to sell, grant, demise, alien or dispose of the same lands, rents, tenements, hereditaments, goods, chattels and effects.

And be it further ordained, That the said corporation be, and shall be for ever hereafter, able and capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in courts of record, or any other place whatsoever, and to do and execute all and singular other matters and things, that to them shall or may appertain to do.

And be it further ordained, That for the well governing of the said corporation, and the ordering of their affairs, they shall have such officers as they shall hereafter direct or appoint: provided nevertheless, that twelve directors, one of whom shall be the president of the corporation, be of the number of their officers.

And be it further ordained, That Thomas Willing be the present president; and that the said Thomas Willing and Thomas Fitzsimons, John Maxwell Nesbitt, James Wilson, Henry Hill, Samuel Osgood, Cadwalader Morris, Andrew Caldwell, Samuel Ingles, Samuel Meredith, William Bingham, Timothy Matlack, be the present directors of the said corporation, and shall so continue until another president and other directors shall be chosen, according to the laws and regulations of the said corporation.

And be it further ordained, That the president and directors of the said corporation shall be capable of exercising such power, for the well governing and ordering of the affairs of the said corporation, and of holding such occasional meetings for that purpose, as shall be described, fixed and determined by the laws, regulations and ordinances of the said corporation.

And be it further ordained, That the said corporation may make, ordain, establish and put in execution, such laws, ordinances and regulations, as shall seem necessary and convenient to the government of the said corporation: provided always, that nothing herein before contained shall be construed to authorize the said corporation to exercise any powers in any of the United States, repugnant to the laws or constitution of such state. And be it further ordained, That the said corporation shall have full power and authority to make, have, and use a common seal, with such device and inscription as they shall think proper, and the same to break, alter and renew, at their pleasure.

And be it further ordained, That this ordinance shall be construed and taken most favourably and beneficially for the said corporation.

Done by the United States in congress assembled, the thirty first day of December, in the year of our Lord one thousand seven hundred and eighty one, and in the sixth year of our independence.

JOHN HANSON, President.

Attest. CHARLES THOMSON, Secretary.

Office of Finance, January 8, 1782.

SIR,

I HAVE the honour to transmit herewith an ordinance, passed by the United States in congress assembled the 31st day of December, 1781, incorporating the subscribers to the Bank of North America, together with sundry resolutions, recommending to the several states to pass such laws as they may judge necessary for giving the said ordinance its full operation. The resolutions of the 26th of May last speak so clearly to the points necessary to be established by those laws, that I need not enlarge on them. Should any thing more be found necessary upon experience, the president and directors will no doubt make suitable applications to congress, or to the states respectively, as the case may require. It affords me great satisfaction to inform your excellency, that this bank commenced its operations yesterday; and I am confident, that with proper management it will answer the most sanguine expectations of those who befriend the institution. It will facilitate the management of the finances of the United States: the several states may, when their respective necessities require, and the abilities of the bank will permit, derive occasional advantage and accommodations from it: it will afford to the individuals of all the states, a medium for their intercourse with each other, and for the payment of taxes, more convenient than the precious metals, and equally safe: it will have a tendency to increase both the internal and external commerce of North America, and undoubtedly will be infinitely useful to all the traders of every state in the Union: provided, as I have already said, it is conducted on the principles of equity, justice, prudence and economy. The present directors bear characters that cannot fail to inspire confidence; and as the corporation is amenable to the laws, power can neither sanctify any improper conduct, nor protect the guilty. Under a full conviction of these things, I flatter myself that I shall stand excused for recommending, in the strongest

manner, this well meant plan, to all the encouragement and protection which your state can give, consistently with wisdom and justice. I have the honour to be, with great respect,

Your Excellency's most obedient,
and most humble servant,

ROBERT MORRIS.

Circular
To the Governours of each state.

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An act for preventing and punishing the counterfeiting of the common seal, bank bills and bank notes of the president, directors and company of the Bank of North America, and for other purposes therein mentioned.

Sect. I. WHEREAS it is necessary, to take effectual measures for preventing and punishing frauds and cheats, which may be put upon the president, directors and company of the Bank of North America, by altering, forging or counterfeiting the common seal, and the bank bills and bank notes of the said president, directors and company:

Sect. II. Be it therefore enacted, and it is hereby enacted by the representatives of the freemen of the commonwealth of Pennsylvania, in general assembly met, and by the authority of the same, That if any person or persons shall forge, counterfeit or alter the common seal of the said president, directors and company, or any bank bill or bank note, made or given out, or to be made or given out, for the payment of any sum of money by or for the said president, directors and company, or shall tender in payment, utter, vend, exchange or barter any such forged, counterfeit or altered bill or note, or shall demand to have the same exchanged for ready money by the

said president, directors and company, or any other person or persons (knowing such bill or note so tendered, uttered, vended, exchanged or bartered, or demanded to be so exchanged, to be forged, counterfeit or altered) with intent to defraud the said president, directors, and company, or any other person or persons, bodies politick or corporate, then every such person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

Sect. III. And be it further enacted by the authority aforesaid, That if any president, director, or any officer or servant of the said president, directors, and company, being intrusted with any such bill or note, or any bond, deed, money or other effects, belonging to the said president, directors, and company, or having any such bill or note, or any bond, deed, money, or other effects, lodged or deposited with the said president, directors, and company, or with such officer or servant, as an officer or servant of the said president, directors and company, shall secrete, embezzle, or run away with any such bill, note, bond, deed, money or other effects, or any part of them, every president, director, officer or servant, so offending, and being thereof convicted, in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

Signed, by order of the House,
FREDERICK A. MUHLENBERG, Speaker.

Enacted into a Law, at Philadelphia, on Monday, the eighteenth day of March, in the year of our Lord one thousand seven hundred eighty and two.

PETER Z. LLOYD,
Clerk of the General Assembly.

Philadelphia, February 9, 1782.

SIR,

THE president, directors and company of the Bank of North America, incorporated by the United States of America in congress assembled, have thought it proper to petition the General Assembly of Pennsylvania for a similar charter, and such further support from the legislature of the state, as may render the bank capable of yielding those advantages to the general cause of America, which are intended thereby: and this institution being encouraged and supported by citizens of other states, as well as that in which it happens to be established, the most respectful and proper mode of presenting the petition to that honourable house appearing to be through the supreme executive council of the state, we have enclosed the same to you, and request that you will please to lay it before the general assembly as soon as they shall meet. I have the honour to be,

Your excellency's most obedient servant,
THOMAS WILLING, President.

His excellency WILLIAM MOORE, Esq. President.

An Act to incorporate the Subscribers to the Bank of North America.

Sect. I. WHEREAS the United States in congress assembled, from a conviction of the support which the finances of the United States would receive from the establishment of a national bank, passed an ordinance to incorporate the subscribers for this purpose, by the name and style of "The President, Directors, and Company of the Bank of North America:"

And whereas the president and directors of the said bank have applied to this house for a similar act of incorporation, which request it is proper and reasonable to grant:

Sect. II. Be it therefore enacted, and it is hereby enacted by the representatives of the freemen of the commonwealth of Pennsylvania, in general assembly met, and by the authority of the same, That those who are, and those who shall become subscribers to the said bank, be and for ever hereafter shall be a corporation and body politick, to all intents and purposes, by the name and style of "The President, Directors and Company of the Bank of North America."

Sect. III. And be it further enacted by the authority aforesaid, That the said corporation are hereby declared and made able and capable in law, to have, purchase, receive, possess, enjoy and retain lands, rents, tenements, hereditaments, goods, chattels and effects, of what kind, nature or quality soever, to the amount of ten millions of Spanish silver milled dollars, and no more. And also to sell, grant, demise, alien, or dispose of the same lands, rents, tenements, hereditaments, goods, chattels and effects.

Sect. IV. And be it further enacted by the authority aforesaid, That the said corporation be, and shall be for ever hereafter, able and capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in courts of record, or any other place whatsoever, and to do and execute all and singular other matters and things, that to them shall or may appertain to do.

Sect. V. And be it further enacted by the authority aforesaid, That for the well governing of the said corporation, and the ordering of their affairs, they shall have such officers as they shall hereafter direct or appoint. Provided nevertheless,

That twelve directors, one of whom shall be the president of the corporation, be of the number of their officers.

Sect. VI. And be it further enacted by the authority aforesaid, That Thomas Willing be the present president, and that the said Thomas Willing, and Thomas Fitzsimons, John Maxwell Nesbitt, James Wilson, Henry Hill, Samuel Osgood, Cadwallader Morris, Samuel Engles, Samuel Meredith, William Bingham, Timothy Matlack and Andrew Caldwell, be the present directors of the said corporation, and shall so continue until another president and other directors shall be chosen, according to the laws and regulations of the said corporation.

Sect. VII. And be it further enacted by the authority aforesaid, That the president and directors of the said corporation shall be capable of exercising such powers, for the well governing and ordering of the affairs of the said corporation, and of holding such occasional meetings for that purpose, as shall be described, fixed and determined by the laws, regulations and ordinances of the said corporation.

Sect. VIII. And be it further enacted by the authority aforesaid, That the said corporation may make, ordain, establish and put in execution such laws, ordinances and regulations, as shall seem necessary and convenient for the government of the said corporation.

Sect. IX. Provided always, That nothing herein before contained shall be construed to authorize the said corporation to exercise any powers in this state, repugnant to the laws or constitution thereof.

Sect. X. And be it further enacted by the authority aforesaid, That the said corporation shall have full power and authority to make, have and use a common seal, with such devices and inscription as they shall think proper, and the same to break, alter and renew, at their pleasure.

Sect. XI. And be it further enacted by the authority aforesaid, That this act shall be construed and taken most favourably and beneficially for the said corporation.

Signed, by order of the House,
FREDERICK A. MUHLENBERG, Speaker.

Enacted into a Law, at Philadelphia, on Monday, the first day of April, in the year of our Lord one thousand seven hundred eighty and two.

PETER Z. LLOYD,
Clerk of the General Assembly.

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ON the 16th day of February, 1782, advanced to the United States, on behalf of Pennsylvania, 80,000 dollars.

At different times in 1782, advanced to the commissioners for defence of the river and bay of Delaware, the sum of about 22,500 dollars.

On the 17th day of September, 1782, advanced to the state treasurer, for defence of the western frontiers, upon application of the house of assembly, 13,333 1-3 dollars, in part of a larger sum agreed to be lent, as the necessity of the state might require; but upon advice from the British commander in chief, that the Indians were called off our frontiers, this requisition stopped, and no further sum was taken out of the bank.

On the 18th day of April, 1784, paid the speaker's draft on the treasurer, accepted by him, in favour of James Mease, 16,000 dollars.

On the 6th of January, 1785, lent the managers of the house of employment, 4,000 dollars.

On the 26th of January, 1785, lent the city wardens the sum of 2,400 dollars.

FINIS.